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Part II

# Department of Transportation

**Research and Special Programs Administration**

**Application for Waiver of Preemption Determination; New York City Fire Department Regulations for Transportation of Hazardous Materials; Notice**

## DEPARTMENT OF TRANSPORTATION

### Research and Special Programs Administration

[Docket No. WPDA-1]

### Application for a Waiver of Preemption Determination Concerning New York City Fire Department Regulations Governing Pickup/Delivery Transportation of Flammable and Combustible Liquids and Flammable and Compressed Gases

**AGENCY:** Research and Special Programs Administration (RSPA), DOT.

**ACTION:** Public notice and invitation to comment.

**SUMMARY:** The City of New York has applied for an administrative determination waiving preemption, under the Hazardous Materials Transportation Act (HMTA), of certain provisions of New York City Fire Department directives. Those regulatory provisions concern the transportation of flammable and combustible liquids and flammable and compressed gases for pickup or delivery within New York City.

**DATES:** Comments received on or before December 13, 1991, and rebuttal comments received on or before January 17, 1992, will be considered before an administrative ruling is issued by the Associate Administrator for Hazardous Materials Safety, Research and Special Programs Administration. Rebuttal comments may discuss only those issues raised by comments received during the initial comment period and may not discuss new issues.

**ADDRESSES:** The application and any comments received may be reviewed in the Dockets Unit, Research and Special Programs Administration, room 8421, Nassif Building, 400 Seventh Street, SW., Washington, DC 20590-0001. Comments and rebuttal comments on the application may be submitted to the Dockets Unit at the above address, and should include the Docket Number (WPDA-1). Three copies are requested. A copy of each comment and rebuttal comment must also be sent to Grace Goodman, Esq., Asst. Corporation Counsel, Law Department, The City of New York, 100 Church Street, room 6 F 41, New York, NY 10007; John J. Collins, Esq., ATA Litigation Center, American Trucking Associations, 2200 Mill Road, 6th Floor, Alexandria, VA 22314; and Timothy L. Harker, Esq., The Harker Firm, 5301 Wisconsin Avenue NW., suite 740, Washington, DC 20015. A certification that a copy has been sent to each person must also be included with the comment. (The following format is suggested: "I hereby certify that copies of this comment have been sent to Ms. Goodman and Messrs. Collins and Harker at the addresses specified in the Federal Register.")

**FOR FURTHER INFORMATION CONTACT:** Edward H. Bonekemper, III, Assistant Chief Counsel for Hazardous Materials Safety, Office of the Chief Counsel, Research and Special Programs Administration, 400 Seventh Street SW., Washington, DC 20590-0001, telephone number 202-366-4400.

**SUPPLEMENTARY INFORMATION:**

#### 1. Preemption Under the HMTA

The preemption provisions of the Hazardous Materials Transportation Act (HMTA), 49 app. U.S.C. 1801 *et seq.*, were amended by the Hazardous Materials Transportation Uniform Safety Act of 1990 (HMTUSA), Public Law 101-615. The Research and Special Programs Administration's (RSPA's) regulations have been revised to reflect these changes. 56 FR 8616 (Feb. 28, 1991); 56 FR 15510 (Apr. 17, 1991).

With two exceptions (discussed below), Section 105(a)(4) of the HMTA, 49 app. U.S.C. 1811(a)(4), preempts "any law, regulation, order, ruling, provision, or other requirement of a State or political subdivision thereof or an Indian tribe" which concerns a "covered subject" and "is not substantively the same" as any provision of the HMTA or any regulation under that provision concerning that subject. The "covered subjects" are defined in section 105(a)(4) as:

(i) The designation, description, and classification of hazardous materials.

(ii) The packing, repacking, handling, labeling, marking, and placarding of hazardous materials.

(iii) The preparation, execution, and use of shipping documents pertaining to hazardous materials and requirements respecting the number, content, and placement of such documents.

(iv) The written notification, recording, and reporting of the unintentional release in transportation of hazardous materials.

(v) The design, manufacturing, fabrication, marking, maintenance, reconditioning, repairing, or testing of a package or container which is represented, marked, certified, or sold as qualified for use in the transportation of hazardous materials.

RSPA has issued a Notice of Proposed Rulemaking proposing a specific definition for the term "substantively the same." 56 FR 36992 (Aug. 1, 1991).

In addition, section 105(b)(4) of the HMTA, 49 app. U.S.C. 1804(b)(4), addresses the preemption standards for hazardous materials highway routing requirements. The Secretary of Transportation has delegated responsibility for those highway routing issues, including the issuance of preemption determinations on highway routing issues to the Federal Highway Administration. 56 FR 31343 (July 10, 1991).

Finally, section 112(a) of the HMTA, 49 app. U.S.C. 1811(a), provides that, with two exceptions discussed below, State, political subdivision and Indian tribe requirements not covered by those section 105 (a) or (b) provisions are preempted if—

(1) Compliance with both the State or political subdivision or Indian Tribe requirement and any requirement of (the HMTA) or of a regulation issued under (the HMTA) is not possible, (or)

(2) The State or political subdivision or Indian tribe requirement as applied or enforced creates an obstacle to the accomplishment and execution of (the HMTA) or the regulations issued under (the HMTA) * * *.

As indicated in the preamble to the final regulation implementing the HMTUSA preemption provisions, 56 FR at 8617 (Feb. 28, 1991), Congress, in section 112, codified the "dual compliance" and "obstacle" standards which RSPA previously had adopted by regulation and used in issuing its advisory inconsistency rulings.

The two exceptions to preemption referred to above are for: (1) State, local or Indian tribe requirements "otherwise authorized by Federal law" and (2) State, local or Indian tribe requirements for which preemption has been waived by the Secretary of Transportation.

All of the above-described preemption standards are in RSPA's regulations at 49 CFR 107.202.

Congress also provided, in section 112(c) of the HMTA, for issuance of binding preemption determinations to replace the advisory inconsistency rulings previously issued by RSPA. Any directly affected person may apply for a determination whether a State, political subdivision or Indian tribe requirement is preempted by the HMTA. A party to a preemption determination proceeding may seek judicial review of the determination in U.S. district court within 60 days after the determination becomes final.

The Secretary of Transportation has delegated authority to issue preemption determinations, except for those concerning highway routing issues, to [illegible] 56 FR 31343 (July 10, 1991). [illegible] Associate Administrator for Hazardous Materials Safety issues those

determinations. RSPA's regulations concerning preemption determinations were issued on February 28, 1991 (56 FR 8616), and are at 49 CFR 107.203–211 and 107.227.

**2. Waiver of Preemption**

Similarly, Congress provided, in section 112(d) of the HMTA, for Secretarial issuance of waiver of preemption determinations to replace the nonpreemption determinations previously issued by RSPA. Any State or local government or Indian tribe may apply for a waiver of preemption concerning any of its requirements which it acknowledges is preempted by the HMTA.

The Secretary may waive preemption of that requirement upon determining that it: (1) Affords an equal or greater level of protection to the public than is afforded by the requirements of the HMTA or the regulations issued under the HMTA, and (2) does not unreasonably burden commerce. A party to a waiver of preemption determination proceeding may seek judicial review of the determination in U.S. district court within 60 days after the determination becomes final.

The Secretary of Transportation has delegated authority to issue waiver of preemption determinations, except for those concerning highway routing issues, to RSPA. 56 FR 31343 (July 10, 1991). RSPA's Associate Administrator for Hazardous Materials Safety issues those determinations. RSPA's regulations concerning waiver of preemption determinations were issued on February 28, 1991 (56 FR 8616) and April 17, 1991 (56 FR 15510), and are at 49 CFR 107.215–227.

In issuing its waiver of preemption determinations under the HMTA, RSPA is guided by the principles enunciated in Executive Order No. 12,612 entitled "Federalism" (52 FR 41685, Oct. 30, 1987). Section 4(a) of that Executive Order authorizes preemption of State laws only when the statute contains an express preemption provision, there is other firm and palpable evidence of Congressional intent to preempt, or the exercise of state authority directly conflicts with the exercise of Federal authority. The HMTA, of course, contains several express preemption provisions, which RSPA has implemented through regulations. However, there are statements of policy in that Executive Order which may be relevant to the discretionary decision whether to waive preemption if the two requirements for waiver are met.

**3. The Application for a Waiver of Preemption Determination**

On October 9, 1991, the City of New York submitted an application for a waiver of preemption determination, which is reproduced in critical part as appendix A to this notice.

Several exhibits were enclosed with the City's application. They are available for examination at, and copies of them are available at no cost from, the Dockets Unit, Research and Special Programs Administration, room 8421, Nassif Building, 400 Seventh Street, SW. 20590–0001, telephone 202–366–4453. The City requirements at issue in this proceeding were determined to be preempted in Inconsistency Ruling 22 (IR–22) (52 FR 46574, Dec. 8, 1987; correction, 52 FR 49107, Dec. 29, 1987) and in the RSPA Administrator's Decision on Appeal (IR–22(A)) (54 FR 26698, June 23, 1989). According to an October 29, 1991 letter from the City to RSPA, on October 18, 1991, in *National Paint & Coatings Ass'n et al.* v. *City of New York et al.* Index No. CV 84–4525 (ERK), the United States District Court for the Eastern District of New York issued an order confirming that the City has acknowledged preemption of its requirements. That decision is reproduced as appendix B to this notice.

**4. Request for Temporary Stay of Preemption**

In its application, the City also requested a temporary stay of preemption as to the regulations which are the subject of its application. In its October 29 letter, the City stated that, because the District Judge in the Federal Court litigation had provided for temporary relief for 150 days, RSPA need not rule on the request at this time. However, the City requested notice and an opportunity to renew its request if no determination is issued by March 15, 1992.

Although no request for a temporary stay of preemption is pending at this time, all parties should be aware that there is no authority in the HMTA for the Secretary or RSPA to temporarily stay preemption. The authority to grant such relief lies, if anywhere, with the courts.

**5. Public Comment**

Comment should be limited to the following issues: (1) Whether the specified City regulations afford an equal or greater level of protection to the public than is afforded by the requirements of the HMTA or regulations issued under the HMTA; (2) whether those requirements do not unreasonably burden commerce, and (3) whether RSPA should grant the waiver request if it makes affirmative findings on issues (1) and (2).

Persons intending to comment on the application should review the standards and procedures governing the Department's consideration of applications for waiver of premption determinations found at 49 CFR 107.215–107.225.

Issued in Washington, DC on November 6, 1991.

**Alan I. Roberts,**

*Associate Administrator for Hazardous Materials Safety.*

Appendix A—Application of the City of New York for a Waiver of Preemption Determination Concerning New York City Fire Department Regulations Governing Pickup/Delivery Transportation of Flammable and Combustible Liquids and Flammable and Compressed Gases

**Before the Associate Administrator for Hazardous Material Safety of the Research and Special Projects Administration of the United States Department of Transportation**

**Application for a Waiver of Preemption Pursuant to 49 U.S.C. 1811(b) and 49 CFR 107.215 et seq. by the City of New York and Its Fire Department**

Dated: October 10, 1991.

**O. Peter Sherwood,**

*Corporation Counsel of the City of New York, Attorney for Applicant, 100 Church Street, New York, New York 10007, (212) 788–0963, Grace Goodman, of Counsel.*

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**City of New York, Fire Department's Memorandum in Support of Application for a Waiver of Preemption—Preliminary Statements**

The Fire Department of the City of New York ("the Department") hereby applies to the Associate Administrator for Hazardous Materials Safety for a Waiver of Preemption, pursuant to section 112(d) of the Hazardous Materials Transportation Uniform Safety Act of 1990 ("HMTUSA") 49 U.S.C. 1081 *et seq.*, and the regulations in 49 CFR 107.215 *et seq. See*, Affidavit of William M. Feehan, Exhibit 20 submitted herewith.

The Fire Department acknowledges that certain sections of its regulations that it wishes to continue to enforce are preempted by section 105(a)(4) of the HMTUSA. However, the Department believes that these regulations meet the standards for a waiver of preemption in that they (1) afford an equal or greater level of protection to the public than is afforded by the requirements of the Act or the regulations issued thereunder and (2) do not unreasonably burden commerce. This memorandum will discuss each of those standards with respect to each of the sections of the Department's regulations as to which a waiver is sought.

*I. Texts of Regulations as to Which Waiver Is Sought*

The Fire Department has four "Fire Prevention Directives" ("F.P.Dir.") containing sections for which the Department wishes to obtain waivers at this time. They are: F.P. Dir. 7–74 covering the tank truck transportation of flammable liquids, Exhibit 1; F.P. Dir. 6–76 covering the tank truck transportation of combustible liquids, Exhibit 2; F.P. Dir. 5–63 covering the transportation compressed gases, Exhibit 3; and F.P. Dir. 3–76 covering the transportation by platform truck of cylinders of compressed gases, Exhibit 4.[1]

[1] The sections quoted in the text are those for which a Waiver of Preemption is being sought at this time.

A. Regulations Establishing Capacity Limits

1. F.P. Dir. 7–74, sections 4–1, 4–2, 4–3:

4–1. The maximum capacity of the tank shall not exceed 4,000 gallons, plus the five percent (5%) allowance for expansion as permitted by Section 4–3.

4–2. The tank shall be divided into one or more independent compartments, no one of which shall exceed in capacity 320 gallons, except in 3,000 gallon gasoline tanks, compartments up to 500 gallons capacity are permitted, and except in 4,000 gallon gasoline tanks, compartments up to 800 gallons capacity are permitted.

4–3. Each compartment shall be provided with five percent (5%) additional space for thermal expansion during transportation or thermal expansion resulting from fire. A manufacturing tolerance of two percent (2%) additional space is permitted for expansion.

2. F.P. Dir. 6–76, sections 4–1, 4–2:

4–1. The total carrying capacity of the tank shall not exceed 4,400 gallons except that oil such as Numbers 4, 5, and 6 fuel oils may be carried in a tank of not more than 6,500 gallons capacity shall tank full.

4–2. The total capacity of any one compartment shall not exceed eleven hundred (1,100) gallons, except that heavy oils Number 4, 5 and 6 may be carried in a single compartment.

3. F.P. Dir. 5–63, sections 10.1, 10.2, 10.5:

10.2 Liquefied petroleum gases; liquefied chlorine; vinyl chloride or any other gases deemed to be hazardous by the Fire Commissioner shall not be stored, transported or delivered in tank trucks within the city.

There are other sections in these four Directives which the Fire Department believes are not preempted by the HMTUSA and for which, therefore, no waiver need be sought at this time. These are: (a) F.P. Dir. 7–74 section 2, F.P. Dir. 6–76 section 2, and F.P. Dir. 5–63 section 2, each requiring that drivers of trucks carrying these hazardous materials pass a Fire Department examination and receive a Certificate of Fitness; and (b) F.P. Dir. 7–74 section 26–2(a)(b) and section 32; F.P. Dir. 6–76 section 26–3(a)(b)(c); and F.P. Dir. 3–76 section 14–3(b)(c), each containing restrictions on storage rather than transportation of these hazardous materials.

The Certificate of Fitness ("COF") regulations are not preempted pursuant to the HMTUSA's "covered subjects" list, section 105(a)(4)(B), Nor are the COF regulations preempted under section 112(a): When the regulations and certification authorized by the HMTUSA in section 159(b) are in place and the Federal Commercial Motor Vehicle Act has become effective in New York, it may no longer be necessary to enforce the City's own COF rules. Until that time the City intends to continue to enforce these sections and believes it is not necessary to seek a Waiver of Preemption as to them.

10.5 Gases deemed hazardous pursuant to section 10.2 of these regulations are:

1. Liquefied Petroleum Gases
a. Butane
b. Butadiene
c. Butylene (Butene)
d. Ethane
e. Propane
f. Propylene (Propens)
g. and the isomers and/or mixtures of the foregoing
2. Acetylene
3. Carbon Monoxide (Liquefied)
4. Chlorine (Liquefied)
5. Cyanogen
6. Cyclopropane
7. Diborane
8. Di, Mono & Tri Methylamines
9. Dimethyl Ether
10. Ethylene
11. Fluorine
12. Hydrogen (Liquefied)
13. Hydrogen Cyanide (Hydrocyanic Acid)
14. Hydrogen Sulfide
15. Methane (Liquefied-LNG)
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17. Methyl Chlorids
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19. Phosgene
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21. Vinyl Chloride
22. Vinyl Fluoride
23. Vinyl Methyl Ether
24. Gas Mixtures of the feregoing, or which contain Class "A" poisons.
25. Other Gases which may be deemed to be hazardous by the Fire Commissioner.

B. Regulations on Tank Construction

1. F.P. Dir. 7–74, section 5–1:

5–1. Each tank shall be an all-metal welded rigid structure, elliptical in cross section and constructed of not less than 3/16th inch . . . steel throughout, except that in 4,000 gallon gasoline tanks, the bottom one quarter of the wrapper sheet shall not be less than 0.3125 inch 5/16th inch . . . steel throughout. Interior longitudinal baffle plates to prevent sloshing shall be provided in 4,000 gallon tank compartments.

2. F.P. Dir. 6–76, sections 4.2, 5.1, 5–2:

4.2. Vehicles having tanks in excess of 5,500 gallon capacity shall have a baffle or baffles provided to minimize sloshing of product.

5.1. The tank shall be a rigid all-steel structure, open hearth or blue annealed steel throughout. All joints shall be welded.

5–2. All gauges specified in this section shall be U.S. Standard gauge. Tanks of not more than 600 gallons

capacity shall be of 12 gauge shell, 12 gauge head. Tanks of over 600 gallons capacity shall be 10 gauge shell, 10 gauge head.

5.3. Material other than open hearth or blue annealed steels may be used if in thickness and designs that will give tank strengths and rigidities not less than those of the steels described and which have an equal or higher melting point.

C. Regulations on Chassis and Combinations To Be Permitted

1. F.P. Dir. 7-74, section 29-2

29-2. Tank semi-trailer equipment which is a vehicle of the trailer type (upon which is mounted a tank) having one or more axles and two or more wheels so designed and used in conjunction with a motor vehicle that some part of its own weight and that of its own load rests upon or is carried by another vehicle, or any vehicle (upon which is mounted a tank) without its own motive power, no part of the weight of which rests on the towing vehicles, but is drawn by a motor vehicle and is known as a full tank trailer, is prohibited.

2. F.P. Dir. 6-76 section 24-1

24-1. The use of a any vehicle (upon which is mounted a tank) without its own motive power, no part of the weight of which rests on the towing vehicle, but is drawn by a motor vehicle and is known as full tank trailer, is prohibited.

3. F.P. Dir. 5-63, section 10.1

10.1. Full type trailers, excepting those not exceeding twelve (12) feet in length and not exceeding a cubical content of seventy-five (75) cubic feet by volume, shall be prohibited for the transportation or delivery of compressed gases in the City of New York. These permitted full trailers shall have their volumetric capacities marked thereon.

Note: A full type trailer is any vehicle without its own motive power, no part of which rests on the towing vehicle but which is drawn by a motor vehicle.

D. Miscellaneous Equipment and Handling Regulations

1. F.P. Dir. 7-74, section 3-1

3-1. [Gasoline] may be discharged by the gravity method only.

2. F.P. Dir. 5-63, section 5.1.2

5.1.2. Cylinders or containers shall be held securely in position by a suitable device or devices which prevent the cylinders or containers from moving about the vehicle while in transit. Cylinders or containers shall not be loaded in any position which would prevent the proper functioning of the safety devices or result in injury to such devices. All cylinders (for gases other than $CO_2$) having a threaded neck ring for attachment of a protective valve cap shall have a cap in place during transportation and handling.

3. F.P. Dir. 6-76, section 25-1

25-1. Smoking on a tank truck is prohibited at all times.

4. F.P. Dir. 3-76, section 12

12-1. Smoking on a truck while transporting or delivering any oils or liquids requiring a permit from the Fire Commissioner is prohibited.

E. Painting and Marking of Gasoline Trucks

1. F.P. Dir. 7-74, sections 28-1, 28-2

28-1. The tank body shall be painted red * * * but the chassis, running gear, cab, bonnet or hood of the motor or the wheels may be painted any color suitable to the applicant. Any new or repainted tank shall be painted red in accordance with ANSI-Z53.1-1976 (Safety Color Code for Marking Physical Hazards).

28-2. The words "Gasoline—Danger" shall be displayed on both sides and rear of the Tank in letters of not less than ten (10) inches high by at least one (1) inch stroke and on the front bumper in letters not less than four (4) inches high by at least one-half (½) inch stroke. The lettering shall be in white.

F. Truck Uses Requiring Special Permission

1. F.P. Dir. 7-74, 26-2(c)

26-2. Flammable liquids or mixtures shall be delivered only * * * (c) from one tank truck into the cargo or fuel tank of another approved truck in emergency caused by an accident or defective tank truck, providing such transfer is in the interest of public safety and the transfer is made only to vehicles with Fire Department permits or otherwise authorized, and such transfer is authorized by a representative of the Fire Department.

2. F.P. Dir. 6-76, Section 26-3(d)

26-3. A tank truck shall be used to deliver * * * (combustible liquids) only * * * (d) from one tank truck into the cargo or fuel tank of another approved truck in an emergency caused by an accident or defective tank truck, provided that such transfer is in the interest of public safety and the transfer is made only to vehicles with Fire Department permits or otherwise authorized and such transfer is authorized by a representative of the Fire Department.

3. F.P. Dir. 3-76, 14-3(d)

14-3. Platform trucks can be used only as follows: (d) Transfer of product from tanks of an approved platform truck to the cargo or fuel tank of an over the road vehicle shall be made only in an emergency caused by an accident or defective equipment, providing such transfer is in the interest of public safety and the transfer is made to vehicles with Fire Department permits or otherwise authorized, and such transfer is authorized by a representative of the Fire Department.

G. Inspection and Permit System

1. F.P. Div. 7-74, Sections 1-1, 1-3, 1-4, 1-5, 1-6

1-1. No person, firm or corporation shall transport or deliver for sale, storage or use, within the city any * * * flammable liquid or flammable mixture * * * except in a tank truck or other vehicle for which a permit has been granted by the Fire Commissioner.

1-3. Application for a permit shall be made on forms prescribed by the Fire Commissioner and shall contain such information as he shall require.

1-4. Unless otherwise provided every permit for a tank truck and the renewal thereof, shall be for a period determined by the Fire Commissioner but in no case to exceed one year.

1-5. The permit is revocable and not transferable to a new ownership and in the case of a change of ownership of the truck, the new owner shall obtain a new permit. A fee for each permit shall be paid in accordance with the schedule in section 27-4027 of the Administrative Code (of the City of New York).

1-6. The permit plate and tab shall remain the property of the Fire Department and shall be prominently displayed on the vehicle in accordance with the following:

(a) The metal permit plate furnished by the Fire Department at the time the Fire Department permit is issued shall be securely and conspicuously fastened to the exterior of the cab on the left side or to the extreme forward left side of the tank or running board. No welding or drilling to the tank shall be permitted.

(b) The yearly renewal tab, furnished by the Fire Department, shall be affixed to the lower right side of the Fire Department metal permit plate in accordance with the instructions on the back of the renewal tab.

(c) The Fire Department metal permit plate shall be returned to the Fire Department when tank truck is no longer to be used for the transportation of gasoline or flammable mixtures, etc. in New York City and renewal application is not being made.

2. F.P. Dir. 6-76, Section 1-1, 1-3, 1-4, 1-5, 1-6

1-1. No person, firm or corporation shall transport or deliver for sale, storage or use, within the City, any (combustible liquid) * * * or combustible mixture * * * except in a

tank truck for which a permit has been granted by the Fire Commissioner.

1–3. Application for a permit shall be made on forms prescribed by said Fire Commissioner and shall contain such information as he shall require.

1–4. Unless otherwise provided every permit for a tank truck and renewal thereof, shall be for a period to be determined by the Fire Commissioner, but in no case to exceed one year.

1–5. The permit is revocable and not transferable to a new ownership and in the case of a change of ownership of the truck, the new owner shall obtain a new permit. A fee for each permit shall be paid in accordance with the schedule in Section 27–4027 of the Administrative Code (of the City of New York).

1–6. The permit plate and tab shall remain the property of the Fire Department and shall be prominently displayed on the vehicle in accordance with the following:

(a) The metal plate furnished by the Fire Department at the time the Fire Department permit is issued shall be securely and conspicuously fastened on the rear of the tank truck in the upper one-third of the tank or bucket box but not within 12 inches of the license plate. No welding or drilling to the tank shall be permitted.

(b) The yearly renewal tab, furnished by the Fire Department, shall be affixed the lower right side of the Fire epartment metal permit plate in accordance with the instructions on the back of the renewal tab.

(c) The Fire Department metal permit plate shall be returned to the Fire Department when the tank truck is no longer to be used for the transportation of combustible mixtures, fuel oil, etc. in New York City.

3. F.P. Dir. 5–63, sections 1.1, 1.3, 1.4, 1.5, 1.6, 9.

1–1. No person, firm or corporation shall transport or deliver for sale, use or storage within the city any [compressed] gases . . . or [flammable or combustible gases or gas which will form an explosive mixture upon concentration in air or which will ignite in air] without a permit from the Fire Commissioner.

1.3. Application for a permit shall be made on forms prescribed by the Fire Commissioner and shall contain such information as shall be required.

1.4. Unless otherwise provided, every permit and the renewal thereof shall be for a period to be determined by the Fire Commissioner but in no case to exceed (1) one year.

1.5. The permit is revocable and not transferable to a new ownership and in the case of a change of ownership of the ck, the new owner shall obtain a new .mit.

1.6. The metal plate furnished by the Fire Department when the permit is issued must be securely fastened at the exterior of the cab on the left side of the truck and displayed during the life of the permit. On a semi-trailer transporting cylinders and portable tanks, the metal plate shall be affixed to the left side of the semi-trailer. On a cargo tank semi-trailer (tank permanently attached) the metal plate shall be affixed to a tank head (near the U.S. Department of Transportation markings).

Section 9. Permit fees. An annual fee shall be charged for each permit in accordance with the provisions of section C–19.24.0 of the Administrative Code (of the city of New York).

*II. Orders Bearing on the Application*

The Fire Department takes the position that there are no existing court orders or rulings issued under § 107.209 having a direct bearing on this application. Two opinions should be mentioned, however, for their indirect bearing.

The United States District Court for the Eastern District of New York, in a case captioned *National Paint & Coatings Ass'n. et al.* v. *City of New York et al.*, Index No. 84 Civ 4525(ERK), issued an order on October 17, 1990, denying summary judgment to plaintiffs, on the ground that the Federal DOT regulations promulgated pursuant to the former Hazardous Materials Transportation Act ("HMTA") did not preempt the City's four Fire Prevention Directives at issue here merely for their lack of uniformity with the federal regulations. Similarly, the OHMT issued an opinion which was affirmed on appeal to the RSPA, in Docket IRA–40A, holding that the City's Directives were, for the most part, inconsistent with the federal regulations under the former HMTA.

However, since the HMTA has now been superseded by the new HMTUSA, those opinions are largely irrelevant. In any case, since the Fire Department is acknowledging preemption, as to the portions of its regulations for which it is seeking a waiver, those opinions are redundant. The opinion in Docket IRA–40A is also inapplicable because it is based on different standards than are applicable to this proceeding for a Waiver of Preemption; that is, no evidence was considered on the relative safety of the two sets of regulations or on their impact on commerce.

Copies of both opinions are annexed hereto as appendix A (court order) and appendix B (DOT opinion).

*III. Provisions With Which the Directives Are Inconsistent*

In general, all of the provisions for which a Waiver of Preemption is sought are preempted by virtue of not being "substantively the same" as regulations on the topics in HMTUSA section 105(a)(4)(B) (the "covered subjects").

Specifically, the provisions for which a Waiver is sought most nearly correspond in content with the regulations listed in the table below, or deal with topics that are within the "covered subjects" list but on which no federal regulations have been promulgated.

| F.P. Dir. | 49 CFR |
|---|---|
| A. Capacity limits: | |
| 7–74, §§ 4–1, 4–2, 4–3 | None. |
| 6–76, §§ 4–1, 4–2 | None. |
| 5–63, §§ 10–1, 10–2 | 173.315. |
| B. Tank construction: | |
| 7–74, § 5–1 (steel only; elliptical thickness; baffles). | 178.346–1(d)(3), 178.345–2, 178.345–3; 178.346–2, 178.345–1(a). |
| 6–76, § 4–2 (baffles) | None. |
| § 5–1 (steel only) | 173.118(b) exempts combustibles. |
| § 5–2 (thickness) | 173.118(b) exempts combustibles. |
| C. Chassis and combinations: | |
| 7–74, § 26–2 (no semi-trailer). | None. |
| 5–63, § 10–1 (no full trailer). | 177.840 no restrictions. |
| D. Equipment: | |
| 7–74, § 3–1 (gravity discharge). | 178.345–9 permits pumps. |
| 5–63, § 5–1.2 (upright only). | 177.840(a) permits horizontal loading. |
| (with caps) | None. |
| 6–76, § 25–1 (no smoking). | None. |
| 3–76, § 12–1 (no smoking). | None. |
| E. Painting of gasoline trucks: | |
| 7–74, § 28–1, 28–2 | 178.345–14 no paint specified. |
| F. Truck uses with permission: | |
| 7–74, § 26–2(c) | 177.856 no provision for notice to F.D. |
| 6–76, § 26–3(d) | None. |
| 3–76, § 14–3(d) | 177.856 no provision for combustibles or notice to F.D. |
| G. Inspection and permit: | |
| 7–74, § 1 | 177.824, 180.405, 178.345–15. |
| 6–76, § 1 | None. |
| 5–63, § 1 | None. |

**Argument**

*IV. The City's Regulations Meet the Standards for Waiver*

Under section 112(d) of the HMTUSA, 49 U.S.C. 1811(d), a waiver of preemption may be granted to a local regulation upon a determination that it "(1) affords an equal or greater level of

protection to the public than is afforded by the requirements of this title or regulations issued under this title, and (2) does not unreasonably burden commerce." Those standards are reiterated in the regulations governing applications for a waiver of preemption in 49 CFR 107.215(b) (6) and (7). The regulations also request a statement on what steps the locality is taking to administer and enforce effectively its regulations, § 107.215(b)(8), presumably to assist the Associate Administrator in considering the factors listed in 49 CFR 107.221(b):

(1) The extent to which increased costs and impairment of efficiency result from the * * * requirement. (2) Whether the * * * requirement has a rational basis. (3) Whether the * * * requirement achieves its stated purpose. (4) Whether there is need for uniformity with regard to the subject concerned, and if so, whether the * * * requirement competes or conflicts with those of other States and political subdivisions.

The New York City Fire Department contends that the regulations that it is submitting for waiver meet all the standards listed above. They will each be discussed below.

A. An Equal or Greater Level of Protection to the Public

1. *Capacity Limits.* The first regulations for which waiver is sought put limits on the capacity of tank trucks that may transport flammable and combustible liquids—gasoline and fuel oil, for the most part—for pickup or delivery in New York City. F.P. Dirs. 7–74 sections 4–1, 4–2, 4–3; 6–76 sections 4–1, 4–2.

The first safety basis for this limitation is obvious: to limit the size of any damage that could result from an accident in which the hazardous product is released from the tank. The less fuel is available to feed a fire, the more easily and faster it can be extinguished.

The DOT regulations do not contain any size limits on cargo tanks for transporting either flammable and combustible liquids or compressed and flammable gases. The only limits are set by total truck weight, which cannot exceed federal and local highway and bridge weight limits. By using aluminum tanks and spreading the weight over tractor-trailer rigs, tank trucks build to federal MC–306 or MC–406 specifications are able to carry 8,000–11,000 gallons of flammable liquids—two to three times as much as is permitted under New York City's regulations.

F.P. Dirs. 7–74 and 6–76 put limits on the total capacity of tank trucks carrying flammables (4,000 gallons) and combustibles (4,400 or 6,500 gallons depending on the grade of fuel oil). They also require that cargo tanks be divided into compartments of specified sizes. This further limits the amount of product that can spill in an accident. If a truck were to lose product from one compartment through a puncture or a defective cover or valve, the other compartments could contain the rest of the product rather than releasing it to feed a larger fire. DOT regulations permit, but do not require, compartments.

A further safety consideration in these limits is that the greater amount of fuel available to feed a fire, the hotter the fire, as it continues to burn at full strength. A hotter, longer fire exposes the metal of the cargo tank to greater stress, weakening its tensile strength and increasing its potential for rupture and explosion. (See discussion in Point IV.A.2, below.)

Similarly, F.P. Dir. 5–63 sections 10.2, 10.5 prohibit transportation of certain very hazardous compressed or flammable gases in tank truck quantities. When these gases are used by industry in New York City, they are available in portable cylinders, which must meet federal DOT standards. Again, if an accident occurred to a truck carrying individual cylinders of these very toxic or unstable gases, the amount of the hazardous gas that could be released from a few damaged cylinders would be much smaller and the resulting damage much less than if the gases were transported in one huge quantity in a full-size cargo tank truck.

A second type of safety consideration is related to the type of construction and configuration of larger tank trucks. Lager tankers tend to have a higher center of gravity than smaller ones; this, coupled with the lack of any compartments or baffles, leads to a higher risk of rollovers (see Exhibit 15), as well as larger spills if an accident does happen. Also, because of weight limits, larger tanks tend to be constructed of aluminum rather than steel; aluminum melts much more quickly than steel if a fire occurs, thus risking release of all the hazardous liquid at once. (See discussion in section IV.A.2, below.) Finally, larger tankers are customarily configured as tractor-trailer or semi-trailer rigs, which can jackknife. (See section IV.A.3, below.) All these construction and configuration characteristics of large trucks increase the risk of accidents happening; the large amount of product carried increases the risk that any accident will turn into a catastrophe.

For all these reasons, the Department's limits on the amount of hazardous liquids and gases that can be carried provide a greater level of protection to the public than do the federal regulations, which contain no limits at all.

The extraordinary need for capacity limits in New York City is illustrated by a comparison of two recent accidents involving gasoline tankers, one in New York City on May 20, 1991 and the other in Carmichael, California on February 13, 1991. The National Transportation Safety Board has issued preliminary inspection reports on each of these accidents. See, Exhibits 9 and 10. The NTSB found that the California accident involved a spill and fire consuming some 8,400 gallons of gasoline in a residential area, causing the total loss of the tank truck, its entire cargo, and two parked cars, and the partial destruction of four homes. Some 405 firefighters took three and a half hours to quench the flames. The New York City accident involved a spill and fire consuming only 1,800 gallons of gasoline, in a commercial neighborhood in the Bronx, causing the total loss of the truck, the car with which it collided, ten parked vehicles, and a row of a dozen stores that, luckily, were unoccupied when the accident occurred, at midnight. According to the New York Times (Exhibit 9), some 225 firefighters took three hours to put out that fire. The truck involved in the New York City accident was a 4,000 gallon vehicle with five compartments; three of the five leaked gasoline from defective hatch covers, but the other two contained their product so that only 1,500–1,800 gallons actually escaped to feed the fire. If the truck involved in the Carmichael accident had crashed in the Bronx location, and had released 8,400 gallons instead of the 1,800 that were involved in the Bronx fire, damage could be expected to be commensurately greater. Even with the smaller amount of gasoline lost, damage was far more extensive in the Bronx than in Carmichael, due to the neighborhood conditions in New York City.

As shown in the Affidavit of Lawrence Lennon (Exhibit 6), every trucking route that goes through New York City—not to mention the side streets and avenues where gasoline stations and other gasoline storage tanks are located (see Exhibit 14)—passes between 25,000 to 50,000 people within a half mile on each side of the road. Suburban locations and less densely-populated cities elsewhere in the country do not present this degree of density or safety hazard.

And as shown by the maps from the City Planning Department (Exhibit 14), locations to which gasoline is delivered

are scattered throughout the City, not just on perimeter roads or a few main highways as in many other urban locations. Gasoline deliveries in New York City are made not only to service stations for resale, but also to fire stations, rental car agencies, garages and parking lots, utilities, City agencies (Sanitation garages, Parks Department facilities, etc.), trucking companies, taxi and car service facilities, and other commercial establishments. In Manhattan alone, there are more than 300 locations licensed to receive deliveries of gasoline and diesel fuel; in the other four boroughs, there are some 3,100 additional locations. These are found in or next to residences (many in high-rise heavily populated buildings), other commercial establishments, and also schools, hospitals, and nursing facilities where especially vulnerable people are housed. Exhibit 14 shows the proximity of gasoline delivery locations to schools in Manhattan; it also shows the pervasiveness of these sites in this most densely-populated borough.

Since oil heat is the commonest form of heating for both air and water heat in New York City, fuel oil deliveries are even more pervasive, to virtually every residence and most commercial buildings in the City. Some 89,170 permits were issued this year to receive deliveries of fuel oil for heating or industrial uses, and that number does not include one- and two-family homes, which do not need to get permits for their fuel oil tanks. Exhibit 14.

Beyond its extreme density of population, in closest proximity to the locations where trucks carrying gasoline and fuel oil necessarily travel, New York City is unique in having an underground network of tunnels for various purposes, into which spilled gasoline can flow in an accident, thus creating hazards to even larger geographic areas. Not only sewers, water and electrical and phone lines, but also subways run under New York City's streets. In the May 1991 accident in the Bronx, the drinking water system was contaminated by the foam that was necessary to contain the fire from a spill of only 1,800 gallons of gasoline. See, Exhibit 9. In the April 1991 accident at the entrance to the Whitestone Bridge, gasoline leaked into the sewer system and spread an underground fire far from the accident site itself. See, Affidavit of Feehan, Exhibit 20.

For all these reasons, New York City requires especially stringent rules to limit the potentially catastrophic impact of any accident that might occur to a gasoline or fuel oil truck or tank truck of extremely hazardous gas. To date, the City's truck specifications (and a generous measure of good luck) appear to have been effective in protecting the residents from any truly catastrophic accident. Any accident in New York City tends to tie up traffic, inconveniencing thousands of travelers. But the May 1991 accident and fire (which occurred at midnight, thus limiting the number of fatalities to those in the two vehicles involved, rather than threatening the hundreds of persons who would have been in the stores during business hours) and a Brooklyn spill and fire in 1989 were so far the only accidents that have resulted in significant property damage at any time since these truck regulations were established. If those accidents had involved MC-306 gasoline trucks, with two to five times as much fuel spilled, the results could have been catastrophic indeed.

2. *Construction factors: steel, thickness, shape, baffles.* A second set of New York regulations with a clear safety basis are those requiring tanks for flammable and combustible liquids to be made of steel, not aluminum as is permitted under the federal DOT regulations. Further, the thickness of the steel required for City trucks is greater than that required by DOT. Thirdly, the City requires an elliptical tank design that keeps the center of gravity lower than the circular design permitted by DOT, plus requiring baffles in large compartments to minimize sloshing that creates instability. F.P. Dirs. 7-74 section 5-1; 6-76 sections 4.2, 5.1, 5.2.

The Department's requirement of all-steel tanks, rather than the aluminum alloys permitted by the federal regulations, is based on the safety considerations that steel does not melt at as low a temperature as do the alloys, and that steel has a greater tensile strength than aluminum.

According to the Tenth Edition of the Metals Handbook, published by the American Society for Metals, Vol. 2, pages 90-101, the aluminum alloys specified by 49 CFR 178.345-2(a)(2) for cargo tanks carrying flammable or combustible liquids all have a melting point of up to or less than 1200 degrees Fahrenheit. (Pure aluminum melts at 1200 degrees. F.) Steel typically melts at no less than 2800 degrees. F.

The higher melting point of steel is critical in an accident resulting in a fire. A fire fed by a petroleum based fuel can reach 2,000 degrees F. in a matter of minutes. If a cargo tank carrying gasoline overturns and spills fuel, which ignites, an aluminum tank will begin to melt in a very short time. A New York City steel tank will not melt, even in a severe fire.

Two recent accidents illustrate this fact of physics: the February 1991 accident in Carmichael, California involving an aluminum gasoline tanker, and the May 1991 accident in the Bronx, New York, involving a steel gasoline tanker. In both cases, the truck overturned, gasoline flowed out from an opening in the tank top, the gasoline ignited and a severe fire followed. According to the preliminary investigation reports by the National Transportation Safety Board, the aluminum tanker completely melted, thus permitting its entire contents (some 8,800 gallons) to be consumed. Exhibit 10. The steel tanker did not melt: Only 1,800 gallons escaped of the 3,800 gallons it was carrying. Exhibit 9.

Second, aluminum and its alloys have a lower tensile strength than steel, and the tensile strength of aluminum alloys is reduced when it is heated by a far higher percentage than the tensile strength of steel is reduced by heat.[2]

As with the melting points of aluminum versus steel, the tensile strengths of these metals especially when heated in a fire following an accident, is critical. An aluminum tank could be subject to puncture or rupture, releasing its product, in circumstances under which a steel tank would not break open.

Again, actual accident experience bears out this fact of physics. In no accident involving New York City steel tank trucks has the tank ever been punctured or ruptured, whether by an overturn or a collision with another car on with a stationary object (pole, bridge support, etc.). But in an accident involving a MC-306 tank truck on December 7, 1986, in Wayne, New Jersey, which overturned on a curve, the tank ruptured when the truck skidded along the road; sparks ignited the gasoline and the entire vehicle with all its 9,000 gallons was consumed in the fire. And of course, the Carmichael accident described earlier involved a possible puncture and a definite meltdown of the aluminum tank, thereby releasing all of its 8,800 gallons of gasoline.

The Fire Department recognizes that the DOT regulations attempt to compensate for the lower tensile

[2] Aluminum Alloy 5052 (one of those permitted under DOT regulations) has a tensile strength of 28,600 pounds per square inch ("psi"); that is reduced to 5,000 psi when heated to 700 degrees F. Steel has a tensile strength of 72,800 psi, which is reduced to 23,000 psi at 700 degrees F. See, O. W. Esback, Handbook of Engineering Fundamentals (2d Edn), pp. 12-32, Fig. 4; Metals Handbook, op. cit.

strength of aluminum by the formula used to determine the thickness of the metal shell of the tank. However, even this formula does not take into account the effect of loss of tensile strength in a heated condition caused by a fire. The formula requires only that "temperature gradients resulting from lading and ambient temperature extremes" be considered; 49 CFR 178.345–3(a)(1). No account is taken of the temperatures that can be expected in a fire situation. Therefore, tanks built to this formula are likely to have thinner shells than those built to the City Fire Department specifications. DOT regulations in § 178.346–2, Tables I and II, for specification 406 tanks to carry flammable and combustible liquids, permit a steel tank shell and heads to be as thin as .10 to .12 inches. The City's regulations for steel tanks carrying flammables requires a thickness of at least 3/16 inch (.1875), and for steel tanks carrying combustibles, 10 gauge U.S. Standard, which is .1379 inch thick.

Also, the DOT formula for thickness is derived from the ASME pressure vessel requirements which are basically intended for vessels in normal use conditions, not those subjected to the stress of an accident in which the tank collides with another vehicle or a bridge abutment or some other object that could puncture the tank. The City's thickness requirements provide an extra edge of safety, intended to protect against such extreme conditions—the very times that protection is most needed.

The City's construction requirement includes a provision for an elliptical shape tank, rather than a full circle which is permitted by DOT regulations. The City bases its rule on the need to keep the center of gravity of a cargo tank as low as possible, to prevent overbalancing on turns or with partially-empty, sloshing loads, that can cause rollovers.

Finally, the Department requires slosh-control baffles in cargo tanks and compartments over a certain size. The instability of sloshing cargo contributes to roll-over accidents. The federal regulations permit, but do not require, compartments and baffles. The Department's rules provide the greater degree of protection on this point.

3. *Type of chassis: limits on trailers.* The City's requirements, in F.P. Dirs. 7–74, section 29–2; 6–76, section 24–1; 5–83, section 10.1, that flammable liquids be carried only in "straight" trucks, rather than tractor-trailers or semi-trailers, and that combustible liquids and compressed or flammable gases may not be carried in full trailers, is directly based on the different safety records of these types of truck combinations.[3] The DOT permits any combination that will meet weight limits; in practice, semi-trailers are the rule for liquids, and hazardous gases may be carried in full trailer-trucks.

Chassis design is basic to stability of the transport vehicle. Semi-trailer and tractor-trailer combinations have a tendency to jackknife, which, of course, a straight chassis truck cannot do. A study of truck accidents in New York City, July 1, 1987 through June 30, 1990, showed that fully 25% were of the jackknife type; clearly jackknifing is a significant risk for truck transportation. See, chart, "NYC Truck Accidents by Type", in Exhibit 13.

Further, the roll-over potential for DOT-specification semi-trailer tank trucks transporting flammable liquids is significantly higher than that for New York City-specification gasoline trucks. According to a 1984 analysis by Prof. Robert D. Ervin of the University of Michigan's Transportation Research Institute, the MC–306s (in use currently and still permitted to be manufactured through August 31, 1993), had a rollover threshold level of 0.32 to 0.35 Gs, whereas the New York City gasoline trucks, with their lower center of gravity, required 0.42 to 0.47 Gs before they rolled over. See, Exhibit 15, pp. 7–8.

In New York City, even the limit access highways were largely constructed prior to development of federal standards for such aspects as the turning radius of exit ramp curves, or the width of lanes and shoulders and often do not meet those standards. See Exhibit 6, Lennon Affidavit. Thus, driving conditions are more difficult than elsewhere in the nation, and an extra degree of vehicle control is necessary to attain the same level of safety. Drivers accustomed to traveling safely at a certain average speed in other cities may lose control on a tighter-than-expected curve in New York; at that point, the rollover threshold of the vehicle becomes critical. Even if it does not roll over, a combination tractor-trailer rig can jackknife and lead to a collision that could damage the hazardous material container as well as provide an ignition source for a fire.

It may be argued that larger trucks will have fewer accidents than small ones, because they have to make fewer trips to deliver the same amount of product. If size were the only factor, that argument might have some weight. But at the sizes of tank trucks that are now being used to transport flammable liquids such as gasoline (8,000–11,000 gallons), other factors come into play. First, the weight limits mean that the tanks must be made of lighter-weight, thinner aluminum than the New York City trucks; second, the size dictates that the tanks be mounted on semi-trailers. These two additional factors tip the risk analysis significantly in favor of the smaller, steel, straight trucks.

In 1987, the City commissioned a study from the Arthur D. Little consulting firm in Boston, to compare the City's regulations on cargo tank capacity and construction with the federal DOT regulations on the same subjects. The study ("the ADL Study") Exhibit 5, balanced the factors that go into a computation of risk, including: the risk that an accident would happen in a certain number of miles driven; the relative miles driven by larger or smaller trucks to make deliveries of the amount of product used in New York City; the risk that an accident would result in a spill of some or all of the product; the risk that a fire or explosion would result from a spill. The ADL Study's conclusion was that accident risk (both frequency and size) would increase by almost 60% if larger tractor-trailer rigs, with tanks made of aluminum rather than steel, were used in New York City instead of the smaller steel tank trucks required by City regulations. If the larger aluminum semi-trailer tanks also lacked compartments or baffles, the risk would go up by 85%. See, ADL Study, Exhibit 5, pp. 5–30 (larger aluminum trucks); 5–38 (larger aluminum trucks without compartments or baffles); Tables 5.17 at p. 5–39 for summary of factors.

4. *Other equipment and handling rules: gravity discharge; cylinder restraints; no smoking.* The Fire Department's regulations as presently written require all tank trucks delivering flammable liquids to unload their product solely by the gravity discharge method, rather than using any kind of pump. F.P. Dir. 7–74, sections 3–1. Upon review, the Department has determined to revise this regulation slightly. It recognized that certain paint components, for instance, are highly viscous and therefore very hard to unload solely by gravity discharge; the Fire Department also recognized that the volume of flammable liquids used in paint manufacture in New York City is slight, compared to the volume of other types of flammable liquids, principally gasoline, to which this regulation is intended to apply. Therefore the Fire Department has revised its enforcement

[3] Also, the prohibition on full trailers is intended to prevent a trucker from uncoupling a trailer (which can stand alone) and leaving it with a hazardous cargo overnight or otherwise unattended in the City.

policy and will be revising the text of the regulation itself, so that it will henceforth apply only to deliveries of gasoline.

The safety basis for this requirement is that, under other Fire Department regulations, storage tanks with permits to receive gasoline must be buried below ground level; therefore gravity discharge is easily feasible, and also discharge by pump is dangerous because it could over-pressure or over-fill the storage tank and cause the gasoline to spill. Also, if a hose ruptures during delivery, discharge by means of a pressure-pump will result in more gasoline being spilled than would occur if the gasoline is merely flowing by gravity.

For trucks carrying cylinders of compressed or flammable gas, F.P. Dir. 5–63, section 5.1.2 requires that the cylinders not be transported in positions that would interfere with the proper functioning of the safety-release valves. These valves are designed to release the gas in vapor form, if emergency venting is necessary.

If the cylinder is carried horizontally, liquid (which sinks) rather than vapor (which rises to the top) is next to the vent valve. If a release of flammable and oxidizing gases occurs in liquid form it would be extremely dangerous. For this reason, the Fire Department interprets this regulation as prohibiting transportation of gas cylinders in a horizontal position; the DOT regulations in 49 CFR 177.840(a)(1) expressly permit such a position. The Fire Department's rule is clearly safer.

Similarly, although DOT-specification cylinders for some types of compressed and flammable gases provide for safety restraint collars or "caps" that can be screwed on, the regulations in § 177.840 do not require that these caps be present or secured during transportation of these cylinders. The Fire Department's regulation expressly provides for this additional level of protection.

The Fire Department regulations forbid smoking by anybody on any truck carrying flammable or combustible liquids or flammable gases. F.P.Dirs. 6–76 section 25; 3–76 section 13–1. The DOT regulations against smoking apparently apply only to persons on tank trucks carrying flammable liquids and gases, but not to those carrying combustible liquids or to trucks carrying smaller containers of flammables or gases. However, in Docket IRA–48, the RSPA ruled that the combustible tank-truck's no-smoking provision, section 25 of F.P.Dir. 6–76, was not inconsistent with federal regulations. Therefore, if the DOT now interprets its regulations against smoking as applying also to all trucks carrying combustible as well as flammable liquids, the corresponding New York City regulations are obviously not preempted. If they were held to be preempted, the City hereby requests a Waiver of Preemption.

5. *Painting and Marking of Gasoline Trucks.* The DOT has no provisions governing the color of trucks carrying flammable liquids such as gasoline. It provides only for small, detachable placards with the identification and symbol for the particular contents of the tank truck. New York City has, for more than half a century, required that gasoline trucks be painted red with the word "GASOLINE" painted in white on the tank and the bumpers in a size of lettering large enough to be seen from a distance. F.P. Dir. 7–74 sections 28–1, 28–2. This provides a warning to other drivers and pedestrians, to stay back and exercise caution appropriate to this extremely hazardous cargo. It also gives an immediate clue to emergency response personnel at an accident as to what type of hazard they are about to encounter. Placards can be removed or destroyed in a fire; a permanent marking is far safer.

6. *Emergency Transfers of Product.* The DOT regulations provide useful guidelines for emergency response to accidents involving various types of products and the Fire Department is happy to use these procedures. But the DOT regulations lack two components that the Fire Department feels are necessary in New York City.

First, the procedures apparently do not apply to emergencies involving trucks carrying combustible liquids such as fuel oil, which is almost as easily ignited as flammables (the flash point of #2 home heating oil can be 125° F., just about the 100° flash point for flammables—a temperature easily reached in case of any spill with a fire). The Fire Department's regulations require emergency procedures (such as removal of the oil to another appropriate truck) in case of damage to a fuel-oil truck, as well as to a gasoline or compressed gas truck. F.P. Dir. 7–74 section 28–2(c); 6–76 section 28–3(d); 3–76 section 14–3(d).

Second, in New York City, the Fire Department wants to be on the scene when such truck-to-truck transfers are made and therefore requires notification to and permission by a Departmental representative before the transfer is made. *Id.* This assures that the receiving truck is appropriate to receive the transferred product, and that the Fire Department is alerted to protect against any further mishap at the scene.

7. *Inspection and Permits.* Under federal regulations, all inspection of hazardous materials trucks carried out by the manufacturers and owners, who must certify that their trucks conform to the DOT standards. No independent inspection is required, making this essentially an honor system.

New York City regulations require annual truck inspections by the Fire Department for vehicles carrying hazardous materials. The trucks' general safety level is checked—tires, brakes, lights, etc.—as well as their conformity to the Department's design requirements for the particular type of product they will carry. To demonstrate their compliance with both these matters, the trucks thereafter carry a New York City Fire Department permit and display a plate with their permit number and annual renewal sticker, on the tank. F.P. Dirs. 7–74 section 1, 6–76 section 1, 5–63 section 1.

According to the inspectors who check trucks for the Department, about 15% fail their annual inspections, and a similar percentage fail spot-checks when stopped on the road and are taken out of service until they correct the problems. See, Exhibit 7, Pepper Affidavit, ¶¶ 9–25.

Also, the New York City Police Department has a special Motor Carrier Safety Unit, on 24-hour patrol throughout the City, stopping trucks that appear to be in violation of some City, State or federal regulations. In the 1991 fiscal year, this unit gave out more than 8,000 summonses for violations. Among the violations discovered by this unit have been false DOT plates, indicating that the honor system does not always succeed. See, Exhibit 8, Novak Affidavit, ¶ 8.

The number of violations found, both by the Fire Department inspectors and the Police Department officers, indicates that truckers do not always follow the rules and do not always adequately maintain their vehicles in safe condition to transport the hazardous materials they are carrying. Without this inspection and permit system, it is foreseeable that even more trucks would be allowed by their owners to operate in an unsafe condition, leading to more, and more serious, accidents. Having to obtain an annual permit, by passing an annual inspection, is an important safety measure that provides a greater level of protection to the public than the federal DOT's honor system of truck certification.

These each of the Department's regulations for which a Waiver of Preemption is sought meets the first test, of providing an equal or greater level of protection to the public than do the federal regulations.

B. No Unreasonable Burden of Commerce

In codifying the second test for whether a local regulation may receive a Waiver of Preemption under the HMTUSA, Congress used the same language as is found in Supreme Court cases discussing the Commerce Clause: that the regulation not impose an "unreasonable burden on commerce." HMTUSA section 112, 49 U.S.C. 1811(a)(2). Therefore it may be presumed that the same standards apply to this test as the Court uses in Commerce Clause cases.

That standard, as explained in, *e.g.*, *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981), has two facets. First, the local rule may not be intended for economic protection of the locality's businesses at the expense of out-of-state businesses; second, any "incidental" burdens on interstate commerce that are imposed by "evenhanded" regulations must be shown to be not "clearly excessive" in light of the local interests served by the local rule. *Id. See also, Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117 (1978); *Pike* v. *Bruce Church Inc.*, 397 U.S. 137, 142 (1970).

Both prongs of this test are satisfied by those portions of the City's Fire Prevention Directives at issue here.

1. *No Protectionist Discrimination.* First, the underlying intent of these regulations is to promote local safety, not local economic interests. Thus any economic burden that results is not intentional economic protectionism but "incidental" to the aim of safety.

Also, the rules are written "evenhandedly" to apply to any trucks delivering or picking up hazardous liquids or gases within New York City, regardless of where the trucks were manufactured or where their owners have their legal residence. These rules are not intended to keep out non-New York City trucks, but to assure that all trucks, whatever their origin, are safe to deliver hazardous materials in the special conditions of New York City. See, Exhibit 18, list of New York City permitted gasoline trucks, showing owners and mailing addresses, which shows that of the 306 trucks that now have Fire Department permits to carry flammable liquids, 105 are owned by one of 19 companies from outside of New York City; 75 are owned by eight different national gasoline companies; and the rest are owned by some 50 other companies, public utilities and City agencies.

Further, in their impact, these regulations do not discriminate in favor of local residents. To the contrary, if they impose any economic burden, it is on the local economy. Any economic burden that may be created by the need for truck companies to spend more to comply with the City's rules is directly imposed on customers within New York City, by a pass-along of costs into the ultimate price paid by the New York City consumer. New York City is not asking the rest of the nation to pay for the City's special safety needs; its residents pay for these needs themselves.

This economic fact is demonstrated by the prices charged to wholesalers and then to retail customers for gasoline and fuel oil in various other parts of New York State, compared to the prices charged in New York City. See, Tables in Exhibit 19. Clearly, any increased costs attributable to special New York City conditions—including any special trucking costs—are passed on to and ultimately burden New York City residents and businesses, not persons and companies outside the City.

2. *Only Slight Economic Burden.* Second, any impact on commerce from increased costs to the petroleum and chemical industries nationwide due to the City's regulations and transportation of those products is too small to be significant. The standard for measuring impact on commerce is that of impact on the whole market, not on any one firm or sub-contractor within the affected industry. *Exxon* v. *Governor of Maryland, supra.*

Thus, the relevant inquiry is what impact the City's regulations have on the cost of producing and selling flammable and combustible liquids and gases (petroleum products and certain chemicals). The shipping cost associated with these industries is only one component of the costs of these industries as a whole, and in this case, any increase due to New York City shipping rules is minimal.

There is little point in discussing separately the economic impact of each one of the Fire Department's regulations for which it is seeking a Waiver of Preemption, since only one of them—tank size capacity—has more than the slightest impact on any costs.

The ADL Study computed the costs of these industries' shipping component (equipment, drivers, operating expenses, insurance and licensing), both for the smaller trucks under the City's regulations and also for the larger trucks not meeting City standards. The ADL Study's figures, discussed in its chapter 4 and summarized in Table 4.7, show that using aluminum tanks rather than steel, in the same size the City requires, would actually increase the cost to the truck owner, since aluminum is more expensive. But when larger aluminum tanks are permitted, so that fewer trucks are required to deliver the volume of product used in New York City, the total cost goes down. Similarly, with regulations requiring compartments or baffles rather than none, it is only when larger tanks are assumed that the cost of these construction details varies more than a few thousands of a percentile. See, Exhibit 5, Table 4.7.

Although no individual cost statistics have been developed on the few additional regulations for which waiver is sought here, it may confidently be assumed that no one of them—gravity discharge equipment rather than pumps, painting trucks red, transporting gas cylinders upright with safety caps, or obtaining a $105 annual truck permit—would by itself add any significant amount to a per-truck annual cost-estimate in the $70,000 range. (See, ADL Study, Table 4.6 for number of trucks and Table 4.7 for total costs for the aggregate number of trucks.) Therefore, the discussion that follows concentrates on the economic impact—or lack of impact—of the regulations limiting tank capacity. The burden on commerce of all the other regulations for which waiver is sought here is simply negligible.

According to calculations by transportation economist Dr. Richard J. Morris, dealing solely with the costs of flammable and combustible chemicals (rather than gasoline and fuel oil), the increase in cost of complying with the City's rules amounts to only 0.009 cents per gallon, which is somewhere from two-tenths of one percent to one percent of the delivered price, depending on the chemical. See, Exhibit 17, Comments of Dr. Richard J. Morris, December 14, 1987, pp. 4–5. That impact is clearly insignificant.

Gasoline and fuel oil make up by far the largest portion of the flammable and combustible liquids delivered to New York City. Compared to flammable and combustible chemicals, the petroleum-based products constitute at least nine-tenths of the market. (The ADL Study estimated that some 3,225 million gallons per year of gasoline and fuel oil were used in the City but only 2.4 million gallons were used per year of flammable mineral spirits, a major flammable chemical. See, Exhibit 5, ADL Study, Table 3.1 at p. 3–5. Estimates by Dr. Morris based on chemical industry data suggest that the gallons per year for all flammable and combustible chemicals might be as high as 350 million; see Exhibit 17, p. 5). Using either end of that spectrum, any increase in costs due to the impact of the City's regulations on shipping of flammable and combustible chemicals alone is a

minuscule part of the entire flammable and combustible liquids market.

As to the petroleum industry, the actual cost burden from the City's truck size rules is even less significant than that for chemicals. Whereas some flammable and combustible chemicals are shipped into New York City from distant manufacturing sites, and thus would probably use large, long-distance tankers for local deliveries if the City permitted them, the gasoline and fuel oil industry does not need to use such trucks. Its products are delivered from local tank farms, not by long-distance truck from distant refineries. Nor do these tank farms receive their product by truck, for the most part. A report from the New York State Energy Department showed that in 1987 (the most recent year for which figures were available), shipment of petroleum products into New York State was 51.5% by pipeline, 46.1% by barge, and only 2.4% by rail and truck, taken together. See, Exhibit 16, May 1989 Draft New York State Energy Plan, Vol. III pp. 34–35. Therefore, with this distribution system in place, even if the City's regulations were removed, gasoline and fuel oil customer deliveries would continue to be made by local truck fleets, not long-distance tankers.

The local truck fleets are already in existence, some owned by the gasoline companies themselves (Amoco, Exxon, Mobil, Shell, etc.), others by various trucking companies in New York City, Long Island, Westchester County, and New Jersey. See, Exhibits 18, truck list, and 7, Affidavit of Pepper ¶ 9, stating that in 1990 the Fire Department had given permits to some 306 trucks for gasoline delivery and to some 2,384 trucks for fuel oil delivery in the City. Therefore, even if the larger trucks were allowed, there is little incentive for the petroleum industry to incur any additional costs for new equipment by switching to long distance trucks, rather than continuing to use their smaller trucks already in place.

The ADL Study, ignoring this fact, made a theoretical estimate of what relative costs would be in the shipping component of the industry, if all petroleum deliveries as well as all chemical deliveries were made by the larger, long distance type trucks. The Study concluded (Exhibit 5, Table 4.8) that using the present smaller trucks, which take more trips to deliver than the same amount of product than would a larger truck, increases shipping costs about 30% over the theoretical use of larger trucks. The ADL Study did not attempt to calculate whether, or in how many cases, petroleum companies would actually switch to the larger trucks if they were allowed. Given New York City's congested traffic and narrow, vehicle-lined streets almost everywhere that local deliveries must be made, companies might have to continue to use the more maneuverable smaller trucks as a matter of practical fact!

The final step in determining whether any economic burden on the market is an "unreasonable burden on commerce" is to balance the economic factors against the weight of the local interest served by the local rule. The ADL Study (without using that terminology) attempted to draw such a balance. The ADL Study quantified its "risk assesement" conclusions and compared them to the economic assessment, much as a policy-maker might do in weighing whether a course of action is worth the cost. The ADL Study's conclusions, expressed visually, are found in Exhibit 5, Figures 6.1 (for regulations on transportation of gasoline), 6.2 (for regulations on transportation of fuel oil), and 6.3 (for regulations on transportation of mineral spirits) at pages 6–2 to 6–4 of the Study. In each case, the safety risks associated with larger trucks with aluminum tanks in New York City increased by 80–90% over the risks associated with small trucks with steel tanks. Against this risk factor, ADL balanced the 30% cost savings in shipping costs associated with larger trucks. The balance falls into the only "moderately attractive" range on the economic side, against the "highly unattractive" range on the safety side.

For such a modest economic gain, New York City strongly believes that the extreme increase in risk of accident (especially given the possibility of catastrophic consequences from any accident in this location) tilts in favor of maintaining safety. Especially since it is the City that bears the burden, the City's regulations must be held to constitute only a reasonable, not an undue, burden on commerce.

*V. The New York City Regulations Meet the Decision Criteria*

In the regulations on Waiver of Preemption, 49 C.F.R. 107.221(b), four factors are listed for the Assistant Administrator to consider in making a determination on whether the local rules qualify for a Waiver of Preemption. The New York City regulations meet all these criteria as well.

A. Extent of Cost Increase and Efficiency Decrease Is Slight

The impact of the City's regulations on cost to the petroleum and chemical industries is discussed in part IV.B above. In brief, only the regulations limiting tank size have any appreciable impact on costs. The actual size of that impact is only speculative, since it appears that larger trucks (which would lower costs) would be used to make deliveries in New York City only by the chemical industry, which represents, at most, one-tenth of the flammable and combustible liquids delivered in New York City. Gasoline and fuel oil would continue to be delivered locally, probably in smaller trucks now being used.

Efficiency, likewise, is not likely to be seriously impaired if a waiver is granted and the current size limits are retained. Some unknown number of chemical producers might choose to ship product directly from a distant plant to a New York City customer in a large aluminum semi-trailer vehicle without stopping for re-distribution at a local chemical broker, as they do now. Such a shipper would indeed find it more efficient not to have the product transferred to a smaller New York City truck. But as discussed above, the bulk of the flammable and combustible liquids delivered in New York City are gasoline and fuel oil, for which there would be no efficiency gain from not having to stop a large long-distance truck at a tank farm to reload into small trucks. Tank farms are already supplied, more efficiently, by pipeline and barge, not by large long-distance trucks.

It is important to note that none of the City's construction regulations apply to trucks carrying hazardous materials that are simply travelling through the City without stopping to pick up or deliver. Thus it is not necessary for through shipments either to change trucks or to get a permit in order to travel from one side of the City to the other. No loss of efficiency in through-travel is caused by these regulations at all.[4]

B. A Rational Basis Exists for These Regulations

As discussed in part IV.A above, the basis for each of the regulations as to which a Waiver of Preemption is sought is safety. Large semi-trailer rigs with aluminum tanks are more likely to have accidents, and the accidents are more likely to be catastrophic in size due to the lower melting point and tensile strength of aluminum than steel. Annual inspections, by other than the truck owners, enforced through a permit

[4] Through trucks are subject to other New York City regulations, on permissible routes and times of travel. These regulations have not been preempted under the FHMTCSA or any regulations yet issued under that Act, and the City is not seeking a Waiver of Preemption as to them at this time.

requirement, contribute to increased safety by encouraging adequate maintenance. Each of the other requirements is based on a safety need and adds a level of protection for the public that is rationally required in the unique conditions of New York City.

C. The Rules Achieve Their Stated Purpose

The City's regulations on truck construction and size have been maintained, first, through the permit system and also through the enforcement efforts both of the Fire Department and the Police Department. See, Exhibits 7, 8, Affidavits of Pepper and Novak, describing the permit and enforcement systems. The rules are not simply stated and left to the truckers' own consciences, but are actively enforced, helping insure that the regulations do achieve their purpose—that of protecting the public from potential accidents that could lead to fires or explosions in the midst of densely-populated residential or commercial areas.

The City's regulations have been in force for more than half a century. To date, very few serious accidents involving gasoline or fuel oil trucks or trucks carrying compressed or flammable gases have occurred in New York City. Of those that have occurred, only three have resulted in fires, and in each of those cases, the size of the fire was minimized by the capacity limits of the tanks and the requirement that tanks be constructed with individual compartments. In no accident involving a City-specification truck has the tank been punctured or melted so as to release the product; any release has always come from injuries to or defects in loading or cover assemblies. This is in contrast to accidents elsewhere, involving federal-specification trucks made of aluminum, which do rupture and ordinarily also melt once a fire has begun, thus leading to release of the entire contents to feed a still-larger fire. See, *e.g.*, Exhibits 10, 12, reports on accidents in Carmichael, CA and Wayne, N.J. Compare these with Exhibits 9, 11, reports on accidents in New York City: Feb. 29, 1988 (fuel oil truck piping sheared off, leaked 800 gallons from only one compartment; no fire); May 5, 1988 (gasoline truck overturned, no spill, 2,800 gallons off-loaded and truck righted and towed with other half of contents safe); October 11, 1988 (3,000 gallon gasoline truck in collision, overturned, between 500–2,000 gallons spilled and ignited, burning two buildings, tank did not rupture or melt); September 13, 1989 (fuel oil truck overturned, leaked unknown amount of its 4,200 gallons of oil, no fire); November 29, 1989 (gasoline truck collided with auto, fire in engine compartment but cargo tank intact and no spill or fire).

Given this record, it appears that the City's regulations have achieved their stated purpose to date. The City wants to continue to maintain this good record by continuing to enforce its regulations in the future as well.

D. No Need for Uniformity; No Conflict With Other States

Congress provided for a Waiver of Preemption even as to regulations on topics included in the "covered subjects" portion of the HMTUSA, as to which a need for uniformity is stated. This indicates that a stated need for uniformity is not the only factor to be considered in deciding whether to grant a Waiver of Preemption. The inclusion of the factor of uniformity, in the list of factors to be considered in the Regulations on Waiver (which factors are not in the statute itself), may simply be intended for application in cases where the law as silent on any need for uniformity, so that this factor may be essentially inapplicable to considering the present application. But insofar as uniformity is weighed on this application, any need for national uniformity must give way to the even more basic need for a level of safety high enough to protect the population of the nation's most densely-settled City.

There is no danger that New York City's regulations will conflict with those of neighboring jurisdictions so as to create a patchwork of rules differing in each and every political subdivision through which a hazardous material shipment may pass. The HMTUSA has taken care of that possibility. New York City is unusual—perhaps alone—in having more stringent safety regulations than the rest of the nation. The only trucks that need to meet those rules are the ones that deliver or pick up in New York City—not those that simply pass through with cargo destined for other locations. The trucks now carrying the vast bulk of the flammable and combustible liquids to which the City's rules apply do not travel nationwide, and thus do not have to worry about whether they will meet the otherwise uniform standards, elsewhere. These trucks are acceptable where they are, as they are, in New York City and its environs.

It is inconceivable that, if the City's regulations do receive a Waiver of Preemption, a City-specification truck would be held to be in violation of the HMTUSA just because it was also operating in New Jersey, Westchester County, or on Long Island. That is, conformance with the City's safer limits, if those are upheld, should not render those trucks "unfit" to carry their cargos in adjacent locales, just because the trucks are not uniform with others in those places. Non-uniformity by waiver does not pose any danger to the overall rule of uniformity elsewhere.

The HMTUSA emphasizes both uniformity and safety—the former presumably not for its own sake, but as a method of achieving the latter. In the case of New York City, the unique combination of factors (including density of population, sub-standard road construction, existence of many subways, bridges, tunnels, a level of traffic congestion that makes emergency response particularly difficult if accidents do occur, and the fact that gasoline and fuel oil must be delivered on virtually every street in the City) means that special rules are needed to achieve the same level of safety as would be achieved by the uniform rules nationwide. Where uniformity hinders rather than helps achieve safety, uniformity must give way. New York City's situation presents such a case.

**Conclusion**

New York City's remaining regulations meet all the standards for a Waiver of Preemption. A Waiver should be granted.

Respectfully submitted,

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Grace Goodman,

*of Counsel.*

City's Appendix A

United States District Court, Eastern District of New York, National Paint & Coatings Association, Inc., *et al.*, Plaintiffs, against City of New York, *et al.*, Defendants.

*Memorandum and Order*

84 CV 4825 (ERK)

Korman, J.

In November 1984, plaintiffs brought this action against the City of New York, *et al.*, to "enjoin implementation and enforcement of ordinances, directives and regulations promulgated by [defendants], which * * * purport to regulate the transportation of hazardous materials to and through New York * * *." Complaint at Paragraph 1. Plaintiffs also sought "a declaration that said ordinances and regulations * * * are unlawful and violate the United States Constitution and are inconsistent with, and preempted by, the Hazardous Materials Transportation Act ("HMTA")

[49 U.S.C. app. 1801 *et seq.* (1982 & Supp. I 1983, II 1984, III 1985, IV 1986, V 1987)] and regulations promulgated thereunder [the Hazardous Materials Regulations ("HMR") 49 CFR 100 *et seq.* (1989)]." *Id.*

On March 12, 1985, plaintiffs moved for summary judgment pursuant to Fed. R. Civ. P. 56. Judge Sifton characterized the motion as follows:

> On this motion for summary judgment, plaintiffs * * * seek invalidation on the basis of preemption of certain sections of the NYFD's regulations in Fire Prevention Directives 3-76, 6-76 (Revised), 7-74 (Revised) and 5-83. Plaintiffs divide these regulations into three categories: (1) Hazard warning signs, (2) cargo containment systems, and (3) those regulations that govern areas regulated by the Federal Motor Carrier Safety Regulations.
>
> * * * * *
>
> In support of its motion, plaintiffs argue that they are entitled to relief as a matter of law because New York City's authority to promulgate regulations concerning the transportation of hazardous materials is automatically preempted by federal law. It is important to appreciate the thrust of this argument. Plaintiffs are not, for the purposes of this motion, arguing that New York's regulations are inconsistent with federal law or that compliance with both federal and city regulations would be economically or technologically impossible. Plaintiffs recognize that both of these arguments are peculiarly factual and would require substantial expert testimony. Rather, plaintiffs argue that the HMTA "regulates hazardous material transportation so comprehensively that any New York City regulations within this area of detailed and persuasive federal control are automatically preempted as a matter of law."

*National Paint & Coatings Ass'n. Inc.* v. *City of New York*, No. 84-4525, slip op. at 5, 7-8 (E.D.N.Y. November 6, 1985) (citation omitted) (hereinafter "Slip op.").

On November 6, 1985, Judge Sifton denied plaintiffs' motion for summary judgment on three grounds. First, he held that "[p]laintiffs have not made a sufficient showing that federal regulations were intended to occupy the field (of hazard warning systems) with respect to such a large number of presumably small local deliveries in the most densely populated urban environment or how (defendants') regulation constitutes an obstacle to the objectives of the HMTA." Slip op. at 21 (citation omitted). Second, he held that defendants' regulation requiring that cargo tanks be made of steel was not automatically pre-empted because the federal regulation requiring that cargo tanks be made of aluminum states that it is only a "minimum requirement[]" and the Research and Special Program Administration of the Department of Transportation ("RSPA") which has jurisdiction over this area, has not "concluded that a requirement beyond aluminum may not be imposed" *Id.* at 22-23. Specifically, Judge Sifton observed:

> Specifications of MC-306 cargo tanks and other hazardous materials containers are subject to detailed federal regulations at 49 CFR 178. However, the language of the federal regulations suggest that [RSPA] did not intend to preempt state regulations in the same area. 49 CFR 178.340-1 provides that construction of MC-306, 307 and 312 tanks must meet the requirements contained in section 178. Section 178.340-1(b) explicitly provides that the requirements in section 178 are minimum requirements.

*Id.* at 22.

Third, Judge Sifton held that defendants' regulations could not be pre-empted by the Federal Motor Carrier Safety Regulations ("FMCSR") in the absence of a factual determination of inconsistency, *id.* at 23-25, because the federal regulation itself states that it is "not intended to preclude States or subdivisions thereof from establishing or enforcing State or local laws relating to safety, the compliance with which would not prevent full compliance with these regulations by the person subject thereto." 49 CFR 390.9 [formerly at 49 CFR 390.30 (1987)].[1]

On April 13, 1987, American Trucking Associations, Inc., one of the plaintiffs in the pending action, along with National Tank Truck Carriers, Inc., filed a petition with the Office of Hazardous Materials Transportation ("OHMT") for an administrative determination whether the regulations at issue are "inconsistent" with the HMTA or with either the HMR or the FMCSR. 52 FR 18,668 (1987). The petition was filed pursuant to 49 CFR 107.203(a), which provides that "[a]ny State or political subdivision or any person affected by a requirement of a State or political subdivision may apply to OHMT for an administrative ruling as to whether a particular existing requirement of the State or political subdivision concerned is inconsistent with a requirement of the (HMTA) or the regulations issued under [it]." Pursuant to 49 CFR 107.205(b), OHMT may publish a "Public Notice and Invitation To Comment" on the petition. After receiving comments from interested parties, the Director of OHMT must employ the following standard to determine whether a local regulation is inconsistent with the HMTA:

> (1) Whether compliance with both the State or political subdivision requirement and the Act or the regulations issued under the Act is possible; and
>
> (2) The extent to which the State or political subdivision requirement is an obstacle to the accomplishment and execution of the Act and the regulations issued under the Act.

49 CFR 107.209(c)(1), (2). The resulting inconsistency ruling is "advisory in nature" and intended to "provide an alternative to litigation for a determination of the relationship between Federal requirements and those of a State or political subdivision." 52 FR 46,574 (1987).

On May 18, 1987, the Director of OHMT issued a Public Notice and Invitation to Comment on the application for an inconsistency ruling. 52 FR 18,667 (1987) (hereinafter "Notice"). Specifically, the Notice advised interested parties that the applicants sought an administrative ruling to determine whether the New York City regulations at issue here "are inconsistent with the Hazardous Materials Transportation Act (HMTA) and the Hazardous Materials Regulations (HMR) issued thereunder, and, therefore, preempted under section 112(a) of the HMTA."[2] *Id.* at 18,668. The Notice went on to advise interested parties that comments "should be restricted" to the issue of whether the New York City regulations "are inconsistent with the HMTA or either the HMR or the FMCSR issued thereunder." *Id.* at 18,670. With respect to the issue whether the regulations were inconsistent with the FMCSR, the Notice advised that "a state or local requirement concerning a subject addressed by the cited FMCSR provisions is preempted only if compliance with it and a provision of the FMCSR is impossible." *Id.* at 18,669.

On December 2, 1987, OHMT issued the inconsistency ruling at issue here, 52 FR 46,574 (1987) (hereinafter "IR-22"), in which it found, *inter alia*, that, because "the HMR issued [under the HMTA] consist of well over 1,300 pages of complex and detailed regulations(,) (i)t is apparent, therefore, that the Secretary, through RSPA, has extensively exercised the HMTA authority to issue 'regulations for the

[1] Judge Sifton held that when the FMCSR was incorporated into the HMTA, 49 CFR 177.804, "DOT explicitly stated that the incorporation did not alter the preemptive effects of the FMCSR." Slip op. at 24. *See* 43 FR 4858 (1978) ("The Department does not intend for [the incorporation of the FMCSR into the HMTA] to alter the categories of persons subject to the FMCSR, to alter the substance of those regulations, or to preempt state or local law not preempted by the FMCSR before incorporation into [the HMTA].").

[2] Section 112(a) of the HMTA provides that "any requirement, of a State or political subdivision thereof, which is inconsistent with any requirement set forth in this chapter, or in a regulation issued under this chapter, is preempted." 49 U.S.C. app. 1811(a).

safe transportation in commerce of hazardous materials.'" *Id.* at 46,580 (citation omitted). OHMT also found, to the extent relevant here, that "[s]ince as early as IR–2, in 1979, it has been clear that hazardous materials transportation cargo containment systems, packagings, accessories, construction tests, equipment and hazard warning systems are areas of exclusive Federal jurisdiction because of the total occupancy of those fields by the HMR." *Id.* (emphasis added).

After an extensive recitation of RSPA's holdings in previous inconsistency rulings and description of the substance of defendants' regulations, the Director of OHMT held:

> In summary, the City has created its own independent set of cargo containment, equipment and related requirements which overlap the extensive HMR requirements, which are likely to encourage noncompliance with the HMR, and which concern subjects that RSPA has determined are its exclusive province under the HMTA.
>
> The City misconstrues the purpose of the language in § 178.340–1(b) of the HMR and in 49 CFR 393.2, which respectively state that cargo tank "specification requirements are minimum requirements," and that the FMCSR do not prohibit the use of consistent additional equipment and accessories. These regulations provide discretion to carriers but do not constitute a grant of authority to State or local governments to impose additional cargo containment system, equipment or related requirements on carriers of hazardous materials.
>
> The City's response that it is providing for greater safety—particularly in light of its allegedly unique local conditions—must be placed in its proper context and, more significantly, does not provide an adequate basis on which to find its requirements consistent.
>
> First, virtually every urban and suburban jurisdiction in the United States has a population density which is a matter of concern in planning for, and regulating, hazardous materials transportation.
>
> Second, consideration of any unique population density of New York City must be accompanied by consideration of the City's unique location as a crossroad for a large percentage of hazardous materials transportation between both New England and Long Island and the rest of the Nation; delays and diversions of such transportation are of great safety concern.
>
> Third, and most significantly, this response is irrelevant. To the extent that the City believes the HMR are inadequate, the City may file a petition for rulemaking with OHMT * * * or otherwise participate in OHMT rulemakings * * * (or) it may request a waiver of preemption under section 112(b) of the HMTA * * *.
>
> In (conclusion), the hazardous materials transportation delays caused by (defendants' regulations) * * * are inconsistent with § 177.853, which mandates that highway shipments of hazardous materials be * * * sported without unnecessary delay.
>
> Virutally all provisions of the City's (regulations) result in serious delays of transportation of hazardous materials, regulate areas which RSPA has defined as exclusively Federal, undermine the likelihood of compliance with the HMR, create obstacles to the accomplishment and execution of the HMTA and the HMR, are thus inconsistent with the HMTA and the HMR, and, therefore, are preempted.

*Id.* at 46,583–84.

Pursuant to 49 CFR 107.211, the City of New York, as a "person aggrieved" by an inconsistency ruling, filed an appeal with the Administrator of RSPA. On June 19, 1989, the Administrator affirmed the decision of the Director of OHMT and adopted his analysis in every material respect. 54 FR 26,698 (1989) (hereinafter "Appeal").[3]

Plaintiffs now seek summary judgment on the basis of that portion of IR–22, and of previous inconsistency rulings, in which RSPA has "consistently held that it 'regulates the subject of cargo tank containment comprehensively and thus within this subject matter area has preempted the field.'" Letter of December 23, 1987 (quoting IR–2, 44 FR 75,570 (1979)). As Judge Sifton observed in his opinion on the first summary judgment motion, see Slip op. at 8, it is "important to appreciate" the argument that plaintiffs do not make in support of their motion. While the HMTA expressly provides that it pre-empts all local inconsistent regulations, and while RSPA expressly held in IR–22 that defendants' regulations were inconsistent with the HMTA, plaintiffs do not seek summary judgment on this ground. Indeed, at the oral argument of the renewed motion for summary judgment, plaintiffs' counsel specifically disclaimed reliance on RSPA's holding that defendants' regulations constituted an obstacle to the accomplishment and execution of the HMTA because they cause confusion among carriers and delays in transportation. Transcript of Oral Argument, January 12, 1990, at 14–15 ("I am not relying on delay for the motion. The motion is clear * * *. We don't even have to talk about the inconsistency provision of Section 112 of the statute."). Plaintiffs' counsel then argued that they were entitled to summary judgment because "[t]he Department of Transportation has intended through its regulation * * * to occupy the designated category we are talking about * * * [and] this court should defer to that exercise of intent [because it is rational]." *Id.* at 15.

[3] On appeal, the Administrator uses the same criteria that the Director of OHMT uses to determine "whether a state or local requirement is consistent with, and thus not preempted by, the HMTA[.]" 54 FR 26,698 (1989).

**Discussion**

The Supreme Court has held that "[t]he statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof." *City of New York* v. *F.C.C.*, 486 U.S. 57, 64 (1988). "Beyond that, however, in proper circumstances the agency may determine that its authority is exclusive and pre-empts any state efforts to regulate in the forbidden area," and "hence render unenforceable state or local laws that are otherwise not inconsistent with federal law." *Id.*

The principal issue raised by plaintiffs' motion for summary judgment relates to the manner in which the Department of Transportation reached its determination that its authority is exclusive and renders unenforceable the New York City regulations at issue even if they are "otherwise not inconsistent with federal law." Although regulations adopted by an agency in accordance with statutory authorization have the force and effect of law, *id.* at 63, the Department of Transportation did not promulgate a regulation declaring the regulations are exclusive nor did it make any findings to that effect at the time it issued the regulations that it now claims reflect its intent to pre-empt wholly local regulation. Indeed, while the Director (OHMT) advised the City that, if it believed the regulations issued pursuant to the HMTA are inadequate, "the City may file a petition for rulemaking with OHMT", IR–22 at 46,584, DOT has for some reason not chosen to exercise power it may have to promulgate a regulation that would explicitly pre-empt all State and local regulation in this area. On the contrary, DOT has chosen to assert its determination to pre-empt in dictum that it enunciated in an after the fact, non-binding opinion issued in the course of an alternative dispute resolution proceeding. This opinion rests, in relevant part, on an inference of DOT's initially unexpressed intent to pre-empt derived from the comprehensiveness of the regulations it has adopted pursuant to the HMTA. IR–22 at 46,590.

In determining the pre-emptive effect of an "interpretive rule" that, like IR–22, was not promulgated in accordance with the substantive rules of the Administrative Procedure Act, the Supreme Court has held:

> "[A] court is not required to give effect to an interpretive regulation. Varying degrees of deference are accorded to administrative interpretations, based on such factors as the

timing and consistency of the agency's position, and the nature of its expertise." We need not decide whether these regulations are properly characterized as "interpretative rules." It is enough that such regulations are not properly promulgated as substantive rules, and therefore not the product of procedures which Congress prescribed as necessary prerequisites to giving a regulation the binding effect of law.

*Chrysler Corp.* v. *Brown*, 441 U.S. 281, 315 (1979) (citation and footnote omitted).[4] Accordingly, assuming Congress intended to confer on the Secretary of DOT the power to decide that its "authority is exclusive and pre-empts any state efforts to regulate in the forbidden area (.)" *City of New York* v. *F.C.C.*, 486 U.S. at 64 (citations omitted), the legal effect of that declaration turns on its reasonableness and persuasiveness and whether the "choice to pre-empt 'represents a reasonable accommodation of conflicting policies that were committed to the agency's care' " by Congress. *Id.* (quoting *United States* v. *Shimer*, 367 U.S. 374, 383 (1961). The relevant part of IR-22 upon which plaintiff's rely fails to meet this test.

Unlike the regulations at issue in *City of New York* v. *F.C.C.*, the principal case cited by plaintiffs, which were preceded by a " 'Notice to retain technical standards guidelines at the federal level which * * * could not be exceeded ( ) in state and local technical quality regulations (.)' " at *Id.* at 65 (quoting 50 FR at 52,464), and which were accompanied by explicit, contemporaneous findings justifying a broad exercise of the agency's pre-emptive power, *id.*, the advisory ruling here was issued after the regulations were promulgated and without prior notice of DOT's intent to exclusively occupy the area. *Compare with City of New York* v. *United States Dep't of Transp.*, 539 F. Supp. 1237, 1257 (S.D.N.Y. 1982) ("DOT's interpretation of its own regulations * * * was announced beforehand and adopted with a reasoned explanation of its content and purpose. Consequently, its validity must be judged by its reasonableness and necessity, not by its form."), *rev'd on other grounds*, 715 F.2d 732 (2d Cir. 1983), *cert. denied* 465 U.S. 1055 (1984).

More significantly, the Director improperly inferred an intent to pre-empt solely based on "the total occupancy of those fields by the HMR [.]" IR-22 at 46,580. The Supreme Court has expressly held that it is improper to infer pre-emption on the basis of the volume and complexity of an agency's regulation, particularly in the fields of health and safety:

> To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence. [Citation omitted].
>
> Given the presumption that state and local regulation related to matters of health and safety can normally coexist with federal regulations, we will seldom infer, solely from the comprehensiveness of federal regulations, an intent to pre-empt in its entirety a field related to health and safety.

*Hillsborough County, Fla.* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 717-18 (1985); *see also Motor Vehicle Mfrs. Ass'n* v. *Abrams*, 899 F.2d 1315, 1320-21 (2d Cir. 1990) ("[I]n a field traditionally regulated by state law, '[w]e are even more reluctant to infer pre-emption from the comprehensiveness of regulations than from the comprehensiveness of statutes.' " [citation omitted]).[5]

While these cases deal with judicial interpretation of an agency's regulations rather than the interpretation by an agency of its own regulations, there is no reason why a different rule should be applied in the latter case. *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978), upon which the Director relied here, IR-22 at 46,580, does not suggest otherwise. There the Supreme Court determined that Congress by clear implication prohibited higher state safety standards for vessels than those promulgated by the Secretary. *Id.* at 174. Accordingly, the Supreme Court held that "[t]he relevant inquiry * * * with respect to the State's power * * * is thus whether the Secretary has either promulgated his own * * * requirement for Puget Sound tanker navigation or has decided that no such requirement should be imposed at all." 435 U.S. at 171-72.

Unlike the statutory scheme in *Ray* v. *Atlantic Richfield Co., supra*, there are no statutory provisions which may be construed to pre-empt any state or local regulations requiring greater safety standards than those actually promulgated by the Secretary. Indeed, the only implication that can be drawn from the statutory scheme is to the contrary, see 49 U.S.C. app. 1811(b),[6] and the Director expressly held in IR-22 that Congress did not intend to authorize the Secretary to pre-empt totally local regulation. IR-22 at 46,580.

Specifically, when Congress enacted the HMTA in 1974, it acted against a policy of "according deference to local safety regulations (because) local authorities are generally in the best position to consider problems unique to their area and to tailor their rules accordingly." *City of New York* v. *Ritter Transp., Inc.*, 515 F. Supp. 663, 670-71 (S.D.N.Y. 1981), *aff'd sub nom. National Tank Truck Carriers, Inc.* v. *City of New York*, 677 F.2d 270 (2d Cir. 1982); *see Raymond Motor Transp., Inc.* v. *Rice*, 434 U.S. 429, 443-44 (1978). While the Director concluded that Congress intended to give DOT the power to promulgate uniform national standards, IR-22 at 46,574, he observed that the express pre-emption clause of the HMTA provides only that "any requirement, of a State or political subdivision thereof, which is inconsistent with any requirement set forth in this chapter, or in a regulation issued under this chapter, is preempted." 49 U.S.C. app. 1811(a). Relying on this limitation, the Director expressly held that:

> This express preemption provision makes it evident that Congress did *not* intend the HMTA and its regulations to completely occupy the field of transportation so as to preclude any State or local action. The HMTA preempts only those State and local requirements that are "inconsistent."

IR-22 at 46,574 (emphasis added). The Director concluded that the most that

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[4] In IR-22, the Director recognized the force of this holding when he distinguished between properly promulgated substantive rules and those that were not promulgated in the manner prescribed by Congress:

> The reason for distinguishing between FMCSR provisions incorporated into the HMR by § 177.804 and those incorporated into the HMR by other HMR sections is that § 177.804 was the subject of unique rule making. That section was issued by a final rule which was not preceded by a notice of proposed rule making (NPRM) because it involved merely agency practice and procedure. Under the Administrative Procedure Act (APA), that section, because of the unusual nature of its promulgation, could not result in substantive changes, such as a change in the pre-emptive effects of the regulations it incorporated into the HMR.
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> IR-22 at 46,575.

[5] The Supreme Court has applied a similar standard in determining whether field pre-emption should be inferred from the comprehensiveness of a federal statutory scheme. *English* v. *General Electric Co.*, ___ U.S. ___, 110 S. Ct. 2270, 2275 (1990).

[6] 49 U.S.C. app. 1811(b) provides that DOT may waive pre-emption of a local rule "not consistent" with the HMTA or the regulations issued thereunder "if, upon application of an appropriate State agency, the Secretary determines that such requirement (1) affords an equal or greater level of protection to the public than is afforded by this chapter or (by) regulations issued under this chapter and (2) does not unreasonably burden commerce." Section 1811(b) plainly implies that only "inconsistent" local regulations that provide for greater safety are pre-empted and it provides for a waiver even in such a case if the regulation does not unreasonably burden interstate commerce. *See City of New York* v. *United States Dep't of Transp.*, 715 F.2d 732, 752 n.21 (2d Cir. 1983), *cert. denied* 465 U.S. 1055 (1984).

could be said with respect to the intent of Congress was that "[w]hile the HMTA did not totally preclude State or local regulation in this area, Congress apparently intended, to the extent possible, to make such State or local action unnecessary." IR-22 at 46,574-75.[7]

Presumably based on the premise that "Congress did not intend the HMTA and its regulations to completely occupy the field of transportation so as to preclude any State or local action," *id.* at 46,574, on July 27, 1987, while the IR-22 proceeding was pending, the Secretary of Transportation proposed legislation that would have amended 49 U.S.C. app. 1804, the statute empowering the Secretary to promulgate regulations in this area, to expressly pre-empt "any State or political subdivision requirement" concerning, *inter alia*, "the designation, description, and classification of hazardous materials," "the packing, repacking, handling, labelling, marketing, and placarding of hazardous materials," "highway routing" of hazardous materials and "the design, fabrication, marking, maintenance, reconditioning, repairing or testing" of containers used in the transportation of hazardous materials. This proposed amendment to 49 U.S.C. app. 1804 was never enacted into law.[8]

IR-22, however, makes little effort to reconcile its conclusion that "Congress did not intend the HMTA and its regulations to completely occupy the field," and the Secretary's unsuccessful effort to obtain an express legislative mandate authorizing its exclusive regulation of the field, with its stated conclusion in IR-22 that the comprehensiveness of its regulation excludes even complementary and consistent local regulation.[9]

Moreover, the effort made by the Director in IR-22 to explain away the regulatory scheme promulgated under the HMTA, which expressly appears to allow for some local regulations intended to ensure the safe transportation of hazardous materials, is unconvincing. In examining the regulatory scheme, Judge Sifton cited the text of 49 CFR 178.340-1(b), which provides that cargo tank specification requirements are "minimum requirements," and held that, because the pre-emption provision of the FMCSR, 49 CFR 390.9 (formerly at 49 CFR 390.30 (1987)), does not preclude consistent local laws relating to safety, defendants' regulations are not pre-empted as a matter of law. Slip op. at 22, 24. Indeed, the Notice and Invitation to Comment published by OHMT prior to its ruling explicitly stated that "a state or local requirement concerning a subject addressed by the cited FMCSR provisions is preempted only if compliance with it and a provision of the FMCSR is impossible." Notice at 18,669.

IR-22, however, held that the minimum requirements clause of the HMR and the specified provisions of the FMCSR were intended to "provide discretion to carriers but (not to) constitute a grant of authority to State or local governments to impose additional * * * requirements on carriers of hazardous materials." IR-22 at 46,583. This reasoning is not persuasive. Standards set by the HMTA and the HMR are, as a matter of law, minimum requirements. While these standards may be exceeded by carriers, this can be accomplished only after compliance with specified procedures to ensure that the manner is which the carriers intend to ship hazardous materials are equal to or exceed the minimum level of safety provided for by the HMTA and the regulations issued under it. 49 U.S.C. app. 1806; 49 CFR 107.103.[10]

Accordingly, if the minimum requirements clause of the HMR and the related FMCSR regulations are intended to "provide discretion to carriers" to adopt stricter standards than required by law, they do so in unusually awkward language that appears to be inadequate to accomplish their purpose. Indeed, a contrary definition of the term "minimum requirements," as it appeared in an act of Congress, was recently adopted by the Court of Appeals:

> Use of the term "minimum" strongly suggests that Congress intended federal law in this area to supplement, not supplant, the rights and remedies provided by state law. Otherwise, the term "minimum requirements," rather than "maximum requirements," "exclusive requirements" or some similar phrase would make no sense in this context.
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> Appellees play down the Act's use of the term "minimum requirements" by arguing that all Congress intended was to leave room for manufacturers to adopt additional requirements voluntarily, not for the states to add requirements. We believe that the Act's other provisions, its legislative history and the (agency's) interpretations cited above do not support the view that the term "minimum requirements" gives leeway to manufacturers but not to anyone else.

*Motor Vehicle Mfrs. Ass'n* v. *Abrams*, 899 F.2d at 1319-20. This analysis seems particularly apposite here.[11]

While a properly formulated statement of an agency's intent to exclusively occupy a field may normally be conclusive of that issue, provided that the agency "acted within the statutory authority conferred by Congress when it pre-empted state and local . . . standards," *City of New York* v. *F.C.C.*, 486 U.S. at 66; *see Hillsborough County, Fla.* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 718 (1985), the relevant part of IR-22 upon which plaintiffs rely is not legally

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[7] Consistent with this deference to local safety regulation, the Court of Appeals in *National Tank Truck Carriers, Inc.* v. *City of New York*, 677 F.2d 270, 275 (2d Cir. 1982), employed a balancing test to reach the conclusion that local routing requirements are not pre-empted because they promote the HMTA's goals, are not in "direct conflict * * * with the federal regulations such that compliance with both is a physical impossibility, * * * do not overlap with any specific directives of the Secretary" and are best issued by localities "far better equipped to do so."

[8] The proposed legislation, accompanied by cover letters from the Secretary of Transportation, Elizabeth Dole, to the President of the Senate and the Speaker of the House, is annexed as Exhibit R to the Affidavit of Grace Goodman dated January 22, 1988.

[9] In affirming the decision of the Director in IR-22, the Administrator of the Research and Special Programs Administration asserted that the submission of the proposed legislation "is not evidence of the need to seek a new statement of [illegible]sion from Congress." Appeal at 28,701. [illegible]rding to the Administrator, the purpose of the legislative proposal "was to codify in the statute the experience which the Department had gained in administering the HMTA since its passage, thereby reducing the potential for conflict between Federal and non-federal requirements". *Id.* This explanation simply amounts to bureaucratic double-talk. If the Secretary was satisfied that Congress intended to authorize DOT to displace all State and local regulation, a binding regulation to that effect could have been promulgated. There was no need to seek legislation to accomplish such a result.

[10] Title 49 U.S.C. app. 1806(a) provides that:

> The Secretary, in accordance with procedures prescribed by regulation, is authorized to issue or renew, to any person subject to the requirements of this chapter, an exemption from the provisions of this chapter, and from regulations issued under section 1804 of this title, if such person transports or causes to be transported or shipped hazardous materials in a manner so as to achieve a level of safety (1) which is equal to or exceeds that level of safety which would be required in the absence of such exemption, or (2) which would be consistent with the public interest and the policy of this chapter in the event there is no existing level of safety established. * * * Each person applying for such an exemption or renewal shall, upon application, provide a safety analysis as prescribed by the Secretary to justify the grant of such exemption. A notice of an application for issuance or renewal of such exemption shall be published in the Federal Register. The Secretary shall afford access to any such safety analysis and an opportunity for public comment on any such application. * * *

[11] Whether the construction placed on the "minimum requirements" and related regulations in IR-22 is correct need not finally be resolved here because, even if these regulations were not intended to "constitute a grant to State or local governments to impose additional . . . requirements on carriers of hazardous materials," IR-22 at 46,583, they plainly do not exclude, or expressly articulate an intent to displace, local regulation. *See Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 147-48 (1963).

binding and is not entitled to deference because it employs an inappropriate inference of pre-emption that fails to reconcile persuasively its ultimate conclusion with DOT's interpretation of the limitations of the power that Congress vested in the Secretary and its own regulations and actions that appear to reflect these self-perceived limitations.

The Supreme Court's decision in *City of New York* v. *F.C.C.*, 486 U.S. 57 (1988), upon which plaintiffs rely, does not support their position. There the Supreme Court addressed the issue whether the FCC acted within the authority conferred upon it by Congress when it totally pre-empted local technical regulations pertaining to cable television. When it adopted the regulations at issue, the FCC specifically articulated its choice to pre-empt as follows:

> Technical standards that vary from community to community create potentially serious negative consequences for cable system operators and cable consumers in terms of the cost of service and the ability of the industry to respond to technological changes. To address this problem, we proposed in the *Notice* to retain technical standards guidelines at the federal level which could be used, but could not be exceeded, in state and local technical quality regulations.
>
> After a review of the record in this proceeding, we continue to believe that the policy adopted in 1974 was effective, should remain in force, and is entirely consistent with both the specific provisions and the general policy objectives underlying the 1984 Cable Act. This pre-emption policy has constrained state and local regulation of cable technical performance to Class I channels and has prohibited performance standards more restrictive than those contained in the Commission's rules. The reasons that caused the adoption of this policy appear to be as valid today as they were when the policy was first adopted. 50 FR at 52,464.

486 U.S. at 65. In concluding that this choice to pre-empt constituted a valid exercise of the power conferred by Congress under the Cable Act, the Supreme Court held:

> We conclude here that the Commission acted within the statutory authority conferred by Congress when it pre-empted state and local technical standards governing the quality of cable television signals. When Congress enacted the Cable Act in 1984, it acted against a background of federal pre-emption on this particular issue. For the preceding 10 years, the Commission had pre-empted such state and local technical standards under its broad delegation of authority to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter * * *" as a means of implementing its legitimate discretionary power to determine what the "public convenience, interest, or necessity requires" in this field.

*Id.* at 66–67 (citations omitted).

The difference between *City of New York* v. *F.C.C.* and this case have already been alluded to earlier and do not require extended discussion. Unlike DOT in the present case, the FCC gave notice of its intent to pre-empt local law prior to the adoption of the regulations at issue, it made principled and persuasive findings relating to the exercise of its power at the time it promulgated the regulations, and the legislative history left no doubt that it acted within the statutory authority authorized by Congress. In almost every material respect, the opposite is true in the present case.

**Conclusion**

The Secretary of Transportation did not issue a binding regulation or a persuasive statement of policy warranting judicial deference, declaring that DOT's "authority to regulate is exclusive and pre-empts any state efforts to regulate in the forbidden area(,)" *City of New York* v. *F.C.C.* 486 U.S. at 64. In so concluding, I do not pass upon the determination of IR–22 that the New York City regulations actually conflict with the DOT regulations here at issue.

In IR–2, the leading inconsistency ruling in this area, the Director of OHMT held that there are "certain areas where the need for national uniformity is so crucial and the scope of Federal regulation is so pervasive that it is difficult to envision any situation where State or local regulation would not present an obstacle to the accomplishment and execution of the HMTA and the [HMR]." 44 FR 75,566 (1979). The Director, nevertheless, "envisioned" at least two "situations" where local regulation in federally regulated field did not present such an obstacle, *id.*, and he framed the ultimate task in the matter before him as examining "each of the Rhode Island requirements * * * individually to determine if they are in direct conflict with a Federal requirement and if not whether they present an obstacle to the accomplishment and execution of the HMTA and the [HMR]." *Id.* at 75,569.

The application of this analysis to the New York City regulations at issue here could very well provide a basis for an inconsistency finding. Indeed, the Director makes a persuasive case for his finding that New York City regulations actually "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives" of the HMTA and the regulations promulgated thereto. *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). Because of the limited ground upon which the motion for summary judgment is based, however, I hold only that the determination of field pre-emption based solely on comprehensiveness of DOT's regulations is not sufficiently persuasive to warrant judicial deference. Accordingly, plaintiffs' motion for summary judgment is denied.

At oral argument of the motion, plaintiffs indicated that, if their motion were denied, they would seek certification for an interlocutory appeal pursuant to 28 U.S.C. 1292(b) (1988). Although I am sympathetic to such an application, *see Baylis* v. *Marriott Corp.*, 843 F.2d 658, 662 (2d Cir. 1988), it should be made in a formal motion which specifically addresses the criteria set out in section 1292(b) and the effect that other challenged regulations, which were not subject to this motion, would have on the application of the statutory criteria.

Dated: Brooklyn, New York, October 17, 1990.

So Ordered:

Edward R. Korman,

*U.S.D.J.*

Appendix B—October 18, 1991 Order of the United States District Court for the Eastern District of New York

**United States District Court, Eastern District of New York, National Paint . . . et al. vs N.Y.C., et al.**

*ORDER*

CV–84–4525

Korman, J.

Plaintiffs have requested partial summary judgement declaring that certain provisions of the City of New York's (City's) Fire Prevention Directives (FPDs) are preempted pursuant to the Hazardous Materials Transportation Act, as amended 49 U.S.C. app. 1801 *et seq.* The parties have agreed and the Court finds that the FPDs in the covered subject areas of 49 U.S.C. app. 1804(a)(4)(B) are preempted and enjoined from further enforcement.[1] Those provisions of the FPDs which the parties agree and the Court finds are preempted are: FPD 7–74 (revised 6/30/88) except Sections 2, 26–2, 26–3, 32, and 39; FPD 6–76 (revised 6/30/88) except Sections 2, 25, 26–3(a), 26–3(b), 26–3(c) 27, and 28; FPD 5–63 (revised 5/11/82) except Sections 2, 3, 6.1 and 7; and FPD

[1] This order does not affect the City's regulations on highway routing and permissible hours of travel certification of drivers of hazardous materials vehicles or provisions in the FPDs that do not deal with transportation.

3-76 (3/7/83) except Sections 12, 14-3(a), 14-3(b), 14-3(c), 15 and 16.

With respect to the FPD provisions set forth in the application of the City to the United States Department of Transportation dated October 10, 1991, for a waiver of preemption,[2] this injunction is stayed for a period of 150 days from October 18, 1991. The City may petition the Secretary of Transportation for further relief.

Citations or notices of violations issued under those provisions for which waiver of preemption is being sought will not be prosecuted by the City during the 150 day period.

Dated: Brooklyn, New York, October 18, 1991.

So Ordered.

**Edward R. Korman,**

*U.S.D.J.*

[FR Doc. 91-27325 Filed 11-14-91; 8:45 am]

BILLING CODE 4910-60-M

[2] These sections involve, in brief, (a) capacity limits on tank truck shipments, (b) requirements that tank trucks be constructed of steel and contain compartments and baffles, (c) that flammable liquids not be transported in semi-trailers nor gases or combustible liquids in full trailers, and (d) a requirement that trucks be inspected annually and carry a permit evidencing such inspection.